INTERNATIONAL LAW AND THE ACQUISITION OF TECHNOLOGICAL CAPACITY BY DEVELOPING COUNTRIES, FROM TECHNOLOGY TRANSFER TOWARDS TECHNOLOGICAL COOPERATION

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THESIS FOR THE DEGREE OF PH.D SUBMITTED TO THE UNIVERSITY OF EDINBURGH -OCTOBER 1992

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HAS BEEN COMPOSED BY MYSELF
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WAIRAMA G. BAKER

"AEQUUM ET BONUM EST LEX LEGUM"

THAT WHICH IS JUST AND GOOD IS
THE LAW OF LAWS

DEDICATION

TO MY FATHER
MUGIMBA Y. ZIRIBASANGA
AND MY MOTHER
RACHAEL W. ZIRIBASANGA

UNIVERSITY OF EDINBURGH

ABSTRACT OF THESIS (Regulation 3.5.10)

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ABSTRACT

Technology is now a separate, central factor in the development of any State. However, today, inter State relations are characterised by wide technological disparity between developed and developing countries. All States agree that transmission of technological capacities to developing countries is key not only to reduction of technological inequalities, but also to maintenance of future international peace.

Traditional international legal responses to the problem are inadequate or static. The traditional multilateral intellectual property legal regime is mercantilist, designed to deal with a technologically minimally interdependent international society. It promotes extra-territorial exclusive protection of private intellectual property rights by comprehensively defining those rights while setting up private international law standards as the as the primary basis for host country regulation of technological rights. Protection of private intellectual property is then reinforced through bilateral treaties. Reform of the regime to facilitate international transmission of technological capacity, is largely regarded as *ultra-vires* its objectives.

Increased extra-territorial effects of technology, the emergence of technologically least developed countries indicating gross interstate technological disparities, the complexity of non State and non national's technological activity in host States, among others, have speeded the evolution of new dynamic multilateral legal principles, standards, rules, procedures and instruments that more effectively define the problem of international technology development and transfer as a State based effective acquisition of technological capacity by a country under balanced legal commitments. We show that in recent decades, in relation to international development and transfer of technology, States have adopted framework treaty type arrangements which aim at dynamic conversion of multilateral decisions, policy, agreements, etc. into legal or quasi-legal norms. When implemented, the new norms extend legal measures and remedies towards those States whose international technological practices most accord with international interdependence and reduction of technological disparities among States.

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ABBREVIATIONS

CERDS	: The Charter of Economic Rights and Duties of States
ECOSOC	: United Nations Economic and Social Council
EEC (OR) EC	: European Economic Community
EPTA	: Expanded Programme For Technical Assistance
GATT	: General Agreement on Tariffs and Trade
GA Res.	: The United Nations General Assembly Resolutions
GROUP B	: United Nations Classification Consisting of the Developed Industrialised Countries
GROUP D	: United Nations Classification Consisting of The Socialist States
ICJ	: International Court of Justice
ICSID Rev - FILJ	: International Centre For Settlement of Investment Disputes Review - Foreign Investment Law Journal
IIC	: International Review of Industrial Property and Copyright Law
ILM	: International Legal Materials
JWTL	: Journal of World Trade Law
LDC	: Developing Countries (Otherwise Classified in The United Nations as The Group of 77)
LLDC's	: Least Developed Countries
MFN	: Most Favored Nation Treatment
NIC's	: Newly Industrialising Countries
NIEO	: New International Economic Order

OECD	: Organisation For Economic Cooperation and Development (Seven Most Industrialised Countries)
RBP	: Restrictive Business Practice(s).
TNC	: Transnational Corporations
UCC	: Universal Copyright Convention (1952) (1971)
UN	: United Nations
UNCTAD	: United Nations Conference on Trade and Development
UNCTC	: United Nations Centre for Transnational Corporations
UNDP	: United Nations Development Programme
UNIDO	: United Nations Industrial Development Organisation
WIPO	: World Intellectual Property Organisation

WORKING DEFINITIONS

Assignment:	Agreement under which the assignee obtains substantially the same rights, privileges and powers, including duration, as those granted to a patentee or other rights holder.
Background: Patent	Foreign or Domestic Patent(s) held by a third party which the grantee of a patent for a new invention or improvement or his licensee cannot avoid infringing upon the practice or exploitation of such subject or improvement.
Balance of Commitments	Dynamic Principle similar to 'overall' reciprocity i.e. the reciprocal effect and equal value of obligations or concessions, for example as applied under GATT. However, balance of commitments is dynamic in nature, applied by States taking into account negotiating disparities between parties, the material condition of each party to a negotiation or transaction and the specific need for differential treatment.
Copyright	The exclusive monopoly right to reproduction in any form (copying) of the source, form or object in which information is presented.
Development	Dynamic process of change and progress towards an ultimate aim (*a telos*).
Exploitation	Right of a holder of an intellectual property right, to make, use, sell or otherwise dispose of according to law, any machine, design or manufacture any of composition of matter physically embodying the invention, or to use or have used the process or method comprising the invention.
Frame Work Treaty Law	Treaties and Institutional Frameworks which member States agree to set up as institutions or mechanisms empowered to make 'operating' decisions continuously, decisions which add to or change previously agreed rules, in accordance with the dynamic and changing circumstances of subjects which are dynamic, wide and yet specific in many aspects, for example free trade zones.
Grant back Clause	Arrangement under which the licensee agrees to convey back to the licensor any improvements made on the original patent or other right.
Implied Terms	Imports into the immediate contract terms and (clause) conditions contained in another agreement (document).
Jus Cogens	Law binding irrespective of the will of individual states.
Jus Dispositivum	Law capable of being modified by consensual engagements.

International Legal Order	Rules which international actors (states) accept as valid and obligatory in the pursuance of international activity/agreements
Licence	A Legal Agreement under which the Licensee, for a consideration, acquires the legal right and power to use, with specified restrictions and obligations, an intellectual property right belonging to the licensor.
Norm (s)	Rules which command, empower, permit or derogate and recognised by the concordance of states as such.
Normalcy	Analogy to human development employed by Tarrullo to define the *normal* state of development towards which all states aspire to achieve, with underdevelopment or post - industrial decline being extremes.
Patents	Exclusive Legal protection of technically novel and inventive ideas applicable to industrially useful products/processes.
Petty patents)	Legal protection for inventive ideas applicable to industrially useful products/processes - but of greatly lesser value and duration than patents.
Piracy	Unauthorised reproduction for commercial purposes of protected works or processes
Registered Designs	Monopoly protection of aesthetically novel Design (s) applicable to commercial products
Rules	Standing orders, which are valid erga omnes (applicable to all) as distinct from commands which are always situation specific
Transparency	Adequate availability to all parties, of all relevant National Laws, Regulations, Administrative Guidelines and International Agreements, applicable to an international transaction (e.g. for the development and transfer of technology)
Trade Marks	Monopoly protection for the identity of a product
Tying	Condition in grant or Conveyance, requiring a grantee to undertake obligations not necessary or adequately related to purpose of main agreement
Utility Models	Monopoly protection of technically useful ideas which however do not meet the full criteria applicable to patents (i.e. non obviousness, novelty and commercial utility).
International Acquisition of Technological Capacity	Process under which nationals of a state, acquire from non nationals, for a consideration, independent technological capacity and ability to usefully apply capacity and innovate in the relevant technology.
Custom	Clear and "continuos" habit of doing certain actions.

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INTRODUCTION

"In international Law, as in Domestic Law, rights and duties go hand in hand. It is therefore legally not permissible to claim rights. .. without being willing to assume correlative duties"

A Constitution for the Oceans, Remarks by Tommy T. B. Koh (President, Third United Nations Conference on the Law of the Sea) Introduction Page XXXVI.

Three Snap shots of developing countries technological evolution:

The first reflected the end of the 1950's, when developing countries were just becoming independent. They were putting together the elements of development plans, and were being persuaded to draft foreign investment laws as possibly the only vehicle for their future economic [social and technical] development. There were pockets of industrialisation to be found, but the question of technology was never mentioned.

The second snapshot represented the end of the 1960's. It showed the advent of import substitution of consumer goods, academic skill formation, followed by movement towards capital goods production [and processing].

The third stage, end of the 1970's, institutional mechanisms [national, regional or global] were applied to develop specific policies, laws, regulations, rules and decrees dealing with technology transfer and new structures [such as] national registries licensing committees, departments, divisions, ministries, to co-ordinate technology imports with national plans and *achieve import substitution of technology itself*"

Adapted from United Nations Conference on Trade and Development, Official Records, 28th. Session, First Special Session, Address by Director of Technology Division, at Page 3.

I.1 Statement of the Problem

Until recently (post 1970's), international development and transfer of technology was viewed as a problem exclusively affecting developing countries, that is, it was not viewed by developed countries as a problem of international interdependence but one of national choices, legal and non legal. The major result of this view was that initial legal responses and solutions to the problem of international technology development and transfer were intrinsically territorial, that is, not taken in a multilateral context or with regard to related international scientific, economic, cultural and other factors.[1]

The nature of the initial legal responses was characterised by predominance of national territory based claims to rights accompanied, by little undertaking of international obligations. Developing countries, the majority newly independent, faced an ever increasing need to acquire technological and scientific skills, mainly available in developed countries. Under the traditional[2] international legal framework, international technology transfer was taken as part of direct foreign investment flows between developed and developing countries and was 'conveniently' classified as a subset of foreign investments and international commerce, largely involving private parties from the developed countries, and developing countries public and private enterprises.

The traditional international legal framework for the regulation of foreign investments, as discussed in Chapter 5 below, emphasised sovereignty and extra territorial protection of rights of nationals investing abroad.

Traditional principles such as material reciprocity, national treatment, non discrimination and standards such as those applying to compensation and levels of protection were applied to regulation of relationships arising during technology development and transfer transactions. However, because technology was taken as a direct investment asset similar to capital, equipment or machinery, the interpretation was that a delivery or sale of technology, which transferred title, possession or ownership, constituted a technology transfer.[3]

Further, the traditional foreign investment framework, largely evolved during the unorganised international society era, (unorganised since it was characterised by self - help, the right to wage war, equal aggrandizement, dependency, ad hoc arrangements, etc.)[4] saw the law applicable to technological `investments' as largely that of the home state or bilateral treaties[5] that provided for extraterritorial extension of guarantees and special advantages offered by the home State to nationals investing their technological property in developing countries. The industrial property legal regime of the home State was often extended under the bilateral treaties to apply in developing countries, even after such developing countries acquired `independence'.[6]

The traditional foreign investment regime, to the extent it was applicable to the complex international technology development and transfer transaction relationships, was characterised by *imbalance* between rights and duties of technology `investors' and host States and their nationals. The imbalance was most pronounced during the international concession regime,[7] though as set out in Chapter 5 of this work, concession like arrangements still characterise international development and transfer arrangements involving the ***least developed*** country nationals and enterprises.

Because of the imbalance in rights and obligations, the traditional foreign investment regime did not legally discourage foreign nationals `investing' technology in developing countries from exclusive application of extraction and exploitation techniques in the host States[8] which excluded the building of a technological capacity in those States. This fact has been the subject of perpetual international legal debate, especially in relation to activities of transnational corporations in host developing countries.[9] During the debate, developed countries lay emphasis on private party -host State `property' relations, that is, the need to safeguard private parties from arbitrary or discriminatory host state action. The `technological' relationship, in terms of duties and rights of the home State vis-a-vis the host State, is regarded as *ultra vires* the foreign investment regime. Further, issues such as control of abuse of rights, preferential treatment for developing country nationals seeking to acquire technology from developed countries, guarantees of effective transfer of technology, etc. are taken as adequately addressed under traditional principles such as freedom of contract, *caveat emptor* and free trade. When followed, such principles make it unnecessary for developed countries to `interfere' in private party transactions unless they take up the claim of a national.[10]

Despite the predominance of national legal responses, multilateral instruments, in the form of intellectual property conventions have existed since the 19th. Century, that is, in the form of the Paris (1883) and Berne (1886) Conventions.[11] These conventions, a result of the mercantile era, did not correct the imbalance in commitments between technological owners and host States. In Chapter 2 below, we show that despite periodic revisions and reforms, the conventions have never adequately and equitably addressed the primary (technological) development interests of developing countries or those of a

technologically interdependent international community. This may be due to the fact that the conventions did not envisage the emergence of a large group of technologically dependent countries, the need to prevent the growth of gross technological disparities between States, the problems of extra-territorial effects of industrial property rights applied in one State on other States in terms of environment, health, culture, etc. Instead, the conventions offer comprehensive definition of standards and terms of protection for intellectual property rights in order to promote international commerce or trade in these rights, that is, their under lying presumption is that all States own roughly equal industrial property rights.[12]

We argue that the traditional multilateral intellectual property regimes have not assisted developing countries, despite their granting and revoking powers and rights to, *inter alia*, correct abuses by intellectual or industrial property rights holders, for example, use of *indivisible technological rights* or `packaging', use of general restrictive practices, importation of hazardous or obsolete technologies, etc. The majority of developing countries have not, *inter alia*, been able to use the conventions to promote local innovation, research in development of technology, by among others, enforcing local exploitation, for example, through the issue of compulsory licences or exclusion from protection of certain `products and processes', offer of special patent rights to nationals, etc.

1.2 Multilateral Legal Responses and The Transmission of Technological Capacity to Developing Countries - The Balance of Commitments Principle

The emergence and continued growth of (the) organised interdependent international community (post United Nations Era), has led to the evolution, within permanent international forums, of multilateral legal measures and practices to regulate the flow of government sponsored technological skill flows between developed and developing countries. These measures, procedures, standards etc. are widely disseminated to all States, impacting not only on those State's national legislative and administrative measures to deal with international transfer and development of technology (Chapter 5), but also their treaty arrangements at regional and sub - regional levels (Chapter 4).

Multilateral legal responses became necessary because of, among others, the increasing centrality of international technology development and transfer in inter - State relations and national growth and development, increased *extra-territorial effects*[13] of technology exploited in one State in other States, the need to determine the international legal role, rights and obligations of private non State parties involved in international development and transfer of technology transactions and most importantly, the need to extend international law to promote the transmission of technological capacity to developing countries as a pre-condition for the maintenance of future international peace.[14] The multilateral legal `intervention' mechanisms, measures, instruments, procedures, etc. involve good offices, mediation, conciliation, consultation, negotiation, arbitration and progressive evolution and development of international law.[15]

1.2.1 Multilateral Level

Using the example of the UNDP multilateral framework, we illustrate, *inter alia,* that multilateral commitments made within the United Nations and other multilateral frameworks[16] by all countries, including developed countries, to transfer systematic technological and scientific skills to developing countries, have been evolved into specific legal principles, procedures, etc. are evolved as *framework treaty* law[17] are of formal legal nature, implemented as measures and instruments for the regulation of the entire process of public or government sponsored international technological skill development and transfer to developing countries. The principles, measures and instruments extend to cover, pre - negotiation, negotiation and implementation of all international technological cooperation agreements, thus guaranteeing balance of commitments.[18] The multilateral framework has also evolved measures and mechanisms that guarantee transparency and accountability, adequate review, monitoring and evaluation, thus promoting equal participation by all parties in the technology development and transfer process. This ensures the party receiving international technological skills develops a full and complete *technological capacity*[19] *in the relevant technology, all in good faith and on preferential terms, in accordance with need* - ***Chapter 3.***

Because of the evolution, among others, of the principles of balance of commitments and preferential treatment in addition to established principles such as goo-faith (non abuse of right),no unjust enrichment, etc. within multilateral agencies, States had gradually moved towards making multilateral instruments such as WIPO administered conventions, that is, Paris, Berne,[20] the UCC,[21] etc. are responsive to the international commitment to transfer technological capacity to developing countries without disrupting the continued production of new

innovations. Revision of the Conventions was undertaken to make them conform to these objectives.

However, under the on-going Uruguay Round in GATT,[22] developed countries have sought to halt or reverse further reform of the WIPO administered conventions by instituting `new' parallel reforms, commonly referred to as TRIPS or trade related aspects of intellectual property.[23] In discussing those aspects of the reforms which would have an impact on developing countries ability to acquire further technological capacity especially through technological imports or enforcement of exploitation of locally protected rights (Chapter 6) we show that developed countries are re-interpreting multilateral intellectual property rules in way which, if implemented, would unbalance commitments between developed and developing countries in their technological relations. We argue that the GATT - TRIPS reforms in their current form are detrimental to developing countries technology development and transfer goals because they seek to grade trade related aspects of intellectual property rights, a development related (commercial) goal, as overriding technology development and transfer policy of developing countries which is a primary development goal.

We contend that this result will be achieved because the GATT -TRIPS reforms aim, *inter alia* at increasing standards of protection for exclusive property rights, extension of Paris Convention's definition of working, restriction of the right of States to determine the nature and scope of the rights be granted, by *de-facto*, linking of the exercise of such sovereign rights to international trade, finance and other arrangements. We argue that unless these reforms are adopted in accordance with the *balance of commitments*[24] principle which is well established under the GATT negotiating procedures as *overall reciprocity* or balance of

concessions, technological and therefore material disparities will increase as the ability of developing countries to acquire technological capacity is further restricted.

1.2.2 Regional and Sub - Regional Measures

The evolution of multilaterally generated legal principles, rules procedures, etc. dealing with the transmission of scientific and technological capacities to developing countries, is enhanced by their incorporation into regional and sub-regional technological cooperation agreements and arrangements[25] as well as gradual but widespread incorporation into national regimes for the regulation of international technology transfer, leading to gradual harmonisation of the national regimes with international law requirements.

Regional

Using the example of the Lome Conventions,[26] we show the extent to which multilaterally evolved principles, rules, mechanisms and measures have influenced regional arrangements for the development of and transfer of technology to developing countries. We question whether the multilaterally evolved legal principles are adequately applied under the Lome technical cooperation arrangements or are only adopted in principle. Given the extreme *technological disparity* between the two partner groups, that is, European Community States and Afro - Caribbean and Pacific States, we assess the extent to which legal principles and rules have been applied to correct the negotiating and bargaining disparities between the State parties and those between their nationals who are involved in ACP - EEC technology development and transfer activity.

We assess how comprehensive implementation of the legal measures dealing with development and transfer of technological skills in ACP States is under the convention's specific `permanent' mechanisms and institutions in which the ACP states participate.

Sub - Regional

Using the Andean Pact arrangements, we examine the extent to which legal principles, rules and procedures, etc. have legally influenced the technology development and transfer arrangements within the sub-region. We specifically show the extent to which `direct regulation' or use of mandatory legislation, sub-regional or national, has been modified to comply with the balance of commitments principle and the need to guarantee transparency of national and sub-regional technology development and transfer laws and regulations. We examine the Andean Pact arrangements to see how far they promote technological `mutual self help' amongst all member States, for example, through a joint technological policy, specific safeguards and preferential measures for the least developed countries, etc. and whether the measures and instruments mitigate abuse of power by foreign technology suppliers, preserve technological balance among the member States, enhance international technology development and transfer transactional transparency, etc.

1.2.3 State Practice - National Instruments

The modification of national legal regimes for the regulation of international technology development and transfer, through incorporation of legal principles, standards, minimum rules, etc. developed through State and permanent

multilateral forum practice, is discussed in Chapter V. Under this Chapter, the traditional treatment of international technology development and transfer as forming part of the direct foreign investment regime is shown to be the result of arbitrary division of public and privately sponsored technology flows which excludes the application of multilaterally generated legal principles, rules, procedures, etc. to the regulation of technology development and transfer transactions involving private parties, thereby preserving imbalance in legal relationships and the non recognition of technology as a separate factor of production with complex effects in host States.

We show that technology importing countries have undertaken widespread incorporation of multilaterally generated rules, principles, procedures, etc. to harmonise their national legal regimes for the regulation of international technology development and transfer with international law. The extent of incorporation is discussed by tracing the existence of principles such as balance of commitments in new national legislation dealing specifically with international technology development and transfer, and the incorporation into such legislation of multilaterally generated rules standards such as transparency (e.g. through divisibility of rights and obligations or `unpackaging'), accountability, preferential treatment, etc. which discernibly modify the traditional principles of freedom of contract, *caveat emptor*, reciprocity, national treatment, non discrimination, or standards of compensation (the so called Hull formula i.e. of prompt, adequate, and effective compensation especially in cases of compulsory acquisition of a non national's property by the host State).[27] We also examine the interrelationship between extent of incorporation of multilaterally generated principles, rules and procedures, etc. on the terms and channels used to transfer technology, that is, the growth of joint ventures, licensing, management contracts, co - production

arrangements, etc. vis-a-vis concession, turnkey and other indivisible type arrangements.

We show that international law is being gradually extended, especially through framework treaty type arrangements, to cover the entire technology development and transfer process, causing increased legal recognition of the need to offer technology to developing countries on equitable terms and conditions that take into account negotiating and bargaining gaps, creating more than candidate rules for future legal recognition, that is, the rules, standards and instruments, principles, etc. as they have evolved already form quasi-legal norms, widely recognised as binding in practice.

For this latter reason, a discussion of the Code of Conduct on the Transfer of Technology, whose contents have already been substantially agreed, is included (Chapter 7). The Code represents a current and future logical step to concretise the international legal regime for the regulation of international development and transfer of technology. We assess the extent to which a Code would promote balance of commitments, for example, by maximising recognition of rights and obligations by home and host States, thus mitigating or eliminating conflict of interest between private property holders and developing country host States. We also argue that the Code would best be able to resolve the complex issues raised by international development and transfer of technology when it is adopted as a *framework treaty law.* Thus adopted, it will not only facilitate the permanent institutionalisation of relationships between international technology suppliers and users, but will also enable, through a multilateral decision making machinery, dynamic and continuous adjustment of agreed rules and procedures in accordance with the needs of dynamic international technological relationships, removing the

need to negotiate a new treaty all the time. Finally, we also argue, among others, that such a Code would make full use of all available international legal means to resolve apparently `intractable' issues such as the exact legal nature of participation by non `traditional' subjects of international law in the international development and transfer regime.

CHAPTER ONE

METHODOLOGY AND ISSUES

1.1 Theoretical foundations and presumptions of the current international legal order and the international Transfer and Development of Technology

Because of its complexity and special characteristics, analysis of the subject of international technology development and transfer[28] under international law could be made at various levels. At one level, we could examine international law as applicable to the subject at hand, if at all, as a "value free neutral" framework. Under this approach it would be sufficient to enumerate, within the limits of Article 38 of the International Court of Justice (ICJ), the relevant treaty or convention provisions, customary law, if any, case law or precedent.[29] Little effect need then be given to "inconvenient" collective pronouncements and decisions of the United Nations General Assembly[30] and other multilateral bodies, which can perhaps also be dismissed as political or moralistic. State practice, whether bilateral, regional or multilateral, would have to satisfy strict judicial or (the) international legal "practitioners"[31] criteria to be of any legal value. In short, law would be neutral.[32]

Under the above noted methodology, issues such as those note immediately below need not be dealt with, that is: *inequality of negotiating and bargaining power* (including transactional incapacity[33] and what parties would have done if they had parity of negotiating/bargaining power) and *enforcement of unequally transacted (international development and transfer of technology) agreements*, that is, whether there is a fair price, need for equality in exchange (necessitating preferential treatment) and observance of

distributive or commutative justice needs, and the legal effect of multilateral resolutions and decisions, etc.

Certain legal and theoretical presumptions with a determinant impact on public international law, especially the international economic and development law aspects are incorporated into this approach. The most important of these theories and presumptions are:

(a) That there is a perfect `competitive market' framework in which all parties have *power parity*. For our purposes, this presumption translates, *inter alia*, into the legal assumption that all states possess equal technological rights and capabilities. Proponents of this theory argue that without an international market[34] in technology, there can be no international technology development and transfer.

We argue that the existence of an international market in technology, though necessary, is not a sufficient condition for the institution and application of specific legal norms and instruments for the regulation of international technology flows. This is due to the fact, among others, that the market concept is of secondary importance during multilateral or government sponsored technological co-operation activity (for example, in international competitive bidding for multilaterally sponsored contracts).

(b) That there is a generally recognised objective "theory of contract"[35] which generates and embodies, inter alia, the theory of sovereign consent and ensures fairness in negotiation and performance of agreements;

(c) All valuable things must naturally be subject to exclusive enjoyment as the normal state of proprietary right, *justice then being defined as*

defence of property and its attendant status. Consequently, for example, in considering international agreements for sale or licensing of technological property, exclusive rights must be regarded as a precondition for promotion of technological activity in the host State, regardless of whether the owner exploits his invention in the host State or not;

(d) Certain legal principles are `binding or even immutable' because they have been defined in the past so to be;

(e) Private international promises and agreements must not be upset and therefore law must conform to and promote voluntary -ness and freedom of private choice, etc.

A second approach could be so called `radicalism',[36] under which we could seek to dogmatically oppose all the above traditionalist or classical presumptions and principles. The radical position is dogmatic because the economic, sectoral or other basis for its arguments, while posited as solutions, are in fact open to opposing non economic, non sectoral, etc. arguments. The main contention under this approach would include the arguments that:

(a)Contracts or agreements between parties with unequal bargaining power, however they may appear to parties, must not be a matter of freedom of command but of choice, that is, when one party is so strong in bargaining power and the other so weak, as a matter of common fairness, the strong should not be allowed to push the weak to the wall;[37]

(b)The State (and subsequently international law) is not a value free neutral framework whose task is to enforce law in cases of dispute but a body with power to create norms and enforce them;[38]

(c) There is no sharp discontinuity between private rights and obligations, State practice and non intervention, etc.

These two foregoing schools of thought have engendered a complicated circular debate on "hard and soft" international law which:

> "proceeds independently of any alleged new norms, blending reliance upon a vision of pre-existing national sovereignties which must be internationally registered or recognised, with reliance upon a region of pre-existing international sovereignties which must be municipally registered or constituted".[39]

Understanding the main arguments presented under the above outlined circular debate is crucial if we are to grasp:

(a) The process by which international legal norms and standards have been denied extension, to cover the entire international transfer and development of technology process;

(b) Why states may declare existent or non existent, international legal norms and standards relating to a new (especially complex) subject of international law, such as international development and transfer of technology;

(c) Why specific international "problems" between State and non State parties, which seem intractable exist for example, those regarding "restrictive" practices;

(d) Why no clear course of action has been postulated, despite the intensity of the debate, and why there is need to follow a *third* course if the problems are to be resolved.

1.2 Sources of international law conflict, progressive evolution of international legal norms and the legal regulation of international technology transfer

Under traditional international law, sources of international law are absolute, as formally set out under Article 38 of the statute of the International Court of Justice (ICJ). Under the article, the Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(i) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

(ii) International custom, as evidence of a general practice accepted as law;

(iii) The general principles of law (recognised by civilised nations);

(iv) Subject to the provisions of Article 59, Judicial decisions and teachings of the most highly highly qualified publicists of the various nations, (as subsidiary means for the determination of rules of law);

The absolute or 'near universal' nature of the article is, according to Swarzenberger, supposed to safeguard international law against the subjectivism of *deductive speculation and eclectic caprice.*[40]

The classification described above has produced a variety of results. *Firstly*, it has encouraged the growth of a sources' doctrine and rhetoric under which proponents of the *hard* or *soft* law approaches attempt to

elaborate theoretical boundaries and abstract categories that are then supposed to control the content of the norms, rather than merely register them.[41] *Secondly*, sources' doctrine and rhetoric, is carried on within an endless structure that opposes sovereign autonomy and absolute private entitlements to sovereign co-operation and qualified rights and obligations, a structure that enables endless "positional switching" by both proponents of the hard and soft law options, that is, as Kennedy notes:

> "when pressed, the hard (international law) defender of a norm can be forced to concede that the norm can only have binding effect if it is soft. Likewise, the defender of a soft norm can be forced to defend his own norm in hard terms...argument within this structure could go on indefinitely without resolution" [42]

Such positional switching is undertaken with little regard to the overriding effects of interdependence, the actual roles of State's fulfilling international obligations and promises, the need for promotion and preservation of international justice and relations.[43]

Thirdly, as Kennedy further correctly notes, sources' doctrine and rhetoric have created an extremely abstract discussion of the general relationship between international and municipal law, that is: whether undertaken as a general inquiry into the relative authority and separation of the two sources;[44] or as a specific inquiry about the process by which an international norm can be imported into municipal law, for example, by transformation, adoption or execution. Under the abstractions stress is laid inter alia, on the organisational features of law enforcement, the systemic character of norms and an implicit acknowledgement of the 'power of power'. The actual context of norm application, and the achievement of

principled "interdependent" adherence to law by states, is down played or rejected.[45]

Among the many requirements of the abstract sources doctrine, regarding the separation of international law from national law, is that, to qualify as international law, such alleged rules must follow a process of evolution, first acquiring universal acceptance as *opinio juris* (for example, the *lex mercatoria* in international trade law)[46] in addition to incorporation into other states municipal laws.[47] This mode of evolving international legal norms was perfected during the unorganised or partly organised stage of international law.

During this stage, 'internationally' desirable objectives were identical with those of the equal and sovereign states and implementation of such objectives was through effective exercise of power. Consequently, many of the norms that evolved during this stage found expression as part of national interest goals of sovereign states, selectively extended through bilateral treaties or various diplomatic devices such as gentlemen's agreements, or imposed as commands, regardless of the international community interest(s).

Such a mode of formulating new norms caused other sovereign states to protect their self interest by, among others, requiring lengthy periods of evolution and consistent application before a norm was created. This process was especially necessitated by the then comparatively "primitive" nature of international communication, including the nature of the international treaty negotiation process based on limited *ad hoc* mandates.[48]

The historical process noted above has had a serious restrictive effect on the subsequent development or adjustment of modes of evolving international law norms and thus rules and standards. Firstly, with reference to customary international law it was formerly maintained that only an immemorial practice could give rise to a customary rule.[19] Today, after the decision in the **North Sea Continental Shelf Cases**[50] opinio juris is no longer seen as a consciousness that matures *slowly* over time but instead as a conviction that "instantaneously" attaches to a rule believed to be socially necessary or desirable, with the "indispensable" requirement that within the period in question, short though it might be, State practice, including that of the states whose interests are specifically affected, should have been both *extensive and virtually uniform.*[51]

It can therefore be correctly maintained that the absolutist requirements with regard to 'time'[52] and standard of decision making necessary to form opinio juris (that is, whether consent[53] or consensus is required), has been replaced by a community standard which does not primarily depend on the relative importance of the states participating in a practice, (and therefore presence or absence of 'underlying authority') or the legitimacy of the form followed, but on the effect of the content of a proposed norm on the (international) community interest and international co-operation,[54] especially in cases where a large amount of 'new' complex international State practice and private activity is involved.[55]

Secondly, with regard to treaties, the *real intention of the parties, (and therefore a just construction of the text),* must be undertaken in conformity with the underlying assumption of consensual inter - State relations, that is, treaties encompass or reflect a consensus between State parties entering into the treaty relations. It is for this reason that historically, most international "treaty" legal developments have taken place as a result of judicial and scholastic interpretation of often conflicting State practice being incorporated into legislation or made into treaties, which then cause a "settling effect" in that area of international law.

1.3 The Third option: International law as a reflection of Organised International Society

From the foregoing, clearly, traditionalist or radical schools would provide inadequate or inappropriate legal solutions to the gross international problem of how to *avail science and technology to all states and peoples*, while preserving the means of continued generation of such science and technology.

All "open" legal systems develop procedures of internal validation by which norms are or can be created, altered or abolished.[56] The international legal system is no exception and member states have evolved distinct new ways of creating, altering and invalidating or voiding of alleged norms[57] without merely constraining 'perceived' State or private entitlements.[58] Such change is justified and necessitated, among others, by the high degree of new inter - State interaction, the complexity of such interaction, disparities among

the sovereign actors and resultant inequality of bargaining and conflict of interest as well as the predominance of non sovereign actors in certain fields of international activity.

These new conditions exist under a `newly' organised international society (that is United Nations era). We therefore argue that a correct approach is to view current international law as reflecting and springing from international society's organised practice.[59] The operation and proceedings of international law under such a regime are distinctly different from those under international law based on *State power or adhoc arrangements*. Organised international society is characterised by comprehensive and permanent multilateral institutionalisation[60] of mechanisms, measures and procedures and measures through which international law then `manifests'. The approach to new and complex issues under organised international society therefore tends to employ the whole gamut of legal intervention mechanisms, that is, from *good offices, mediation, conciliation, consultation, arbitration, litigation to gradual development of international co-operation, etc.* with the intention of effecting the extension of international legal backing towards that State or States whose claims most accord with interdependence, respect for sovereignty and preservation of international peace.[61]

Primarily, we intend to show that, under the organised international community, the progressive evolution and extension of international legal principles and minimum standards for the regulation of international technology transfer is primarily based on the organised practice of States under permanent

inter - State organisations. This approach promotes the interpretation of new norms, general principles, standards or rules in favour of interdependence, the collective interest and international equity (especially the prevention of unjust enrichment, arbitrariness and abuse of rights).[62] Consequently, it is simultaneously less restrictive in nature and takes a more dynamic view of international society than that envisaged in the classification laid down by Article 38, while at the same time avoiding "the subjectivism of deductive speculation and eclectic caprice". Also, under this approach, the increased dependency of an organised international community on legitimate consensus and reciprocity (including reciprocal entitlement violation)[63] to achieve universally recognised goals such as the transmission of scientific and technological capacity to developing countries as a tool for eliminating material inequalities between states, is stressed.

1.4 From International Commerce in Technology towards Co-operation to Promote Acquisition of Technological Capacity in Developing Countries

Most states agree that greater application of international legal norms and equitable principles is a precondition for effective transfer of the products of the human intellect from highly industrialised countries to developing countries and the achievement of greater material equality (especially in technological sense) between states, peoples and individuals.[64] However, the recognition of the need to extend international legal and equitable principles to the entire international development and transfer of technology process has received little implementation in practice mainly due to:

(a) The continuing conflict over sources of international law, as outlined above, causing, among, others, rejection by some States of the need to extend international law to the entire international development and transfer of technology process;

(b) Continued conflict over what constitutes an international development and transfer of technology, that is:

(i) The current definition of international technology transfer as a commercially motivated international private party activity (or transaction) which largely excludes the well established legally regulated multilateral government sponsored flows of technological skills (which in practice constitute the most effective means for acquisition of technological capacity by developing countries importing technology);

(ii) The truncation of or dichotomy in (i) above causing a failure to define the exact nature of the technology acquisition process of as a dual process involving supply of technology, for example, through giving access to intellectual property rights whether through sale, licensing, management contracts, etc. and the effective `uptake' of such supplied skills by nationals of the recipient State, which then concludes the transfer.

It may be noted that it is for this reason that the Code of Conduct on Transfer of Technology excludes the sale of goods form its definition of international technology transfer. Where nationals of the recipient country are unable to assimilate the supplied technology, that is, acquire technological capacity in the relevant technology, there is no development

or transfer of technology, even though the technology is physically operated in the host State;

(c) Who are the legitimate parties to whom international legal norms, principles, etc. for the regulation of international development and transfer of technology may be applicable and whether non State parties may be subject to such a regime, that is:

(i) The assumption that a recipient State can only intervene in international technology development and transfer arrangements if the recognised interplay of contractual forces fails, that is, where there are such factors as fraud, duress or mistake,[65] or if the agreement has anti competitive effects. This assumption is contrary to the legitimate rights of a State to guarantee, subject only to international law,[66] its technological and scientific development, for example, through enforcement of local exploitation of protected technological rights, promotion of access to imported technology (through inter alia, elimination or control of use of restrictive practices in technology transfer contracts, prevention of disparity in values exchanged or import of hazardous or obsolete technologies, etc.)

1.5 Summary of Issues

1.5.1 Preliminary Legal Issues Caused by Wide Technological Disparity or Inequality Between States:

Modern technology has raised a host of issues in relation to its impact on inter - State relations and therefore international law. Many of the issues have a direct impact on existing international legal frameworks, institutions, measures and instruments. Among the outstanding technology related issues with an international legal dimension are:

1.5.2 General

The wide technological disparity between States, per se, raises, on the one hand, questions about the rights and duties of `technology owning' States in relation to, inter alia :

(a) Technology ownership, that is, interest in promotion of public or government owned rights vis-a-vis private rights promotion and extent to which States can legally `intervene' extra territorially to protect, inter alia, their national's technological property interests;

(b) The legal rights and duties of these States, if any, in mitigating bargaining and negotiating power disparities[67] between their nationals and non nationals wishing to acquire technology;

(c)The role of technology in the evolution of a New International Economic Order, is equally controversial, that is:

(i)The cost of access to technology and the meaning of access, especially under special and preferential treatment;

(ii) The existence of an international legal duty or obligation to promote development, that is, acquisition of technological capacity by developing countries on preferential terms;

(iii) The right of recipient states to participate effectively and equally, in international technological co-operation activity;

(d) Whether technology forms part of the *common heritage of mankind;*

1.6 The Traditional Framework - The Multilateral Intellectual Property System and the Acquisition of Technological Capacity by Developing Countries (Chapters 2 and 6)

Developing countries have consistently criticised the basic precepts and actual operation of the existing multilateral intellectual property treaties and conventions (largely administered by the World Intellectual Property Organisation {WIPO}).[68] Despite some reforms, (for example, of the Berne and Universal Copyright Conventions[69] and the on-going - now endangered[70] - attempts to revise the Paris Convention),[71] the conventions do not effectively or seriously address the problems of a large group of technologically dependent states. Instead, they concentrate on comprehensively defining intellectual property rights and standards for their protection.

In the context of the theoretical framework of the multilateral intellectual property Conventions (the Paris, the Berne and the Universal Copyright Conventions - see Chapter 2) and the multilateral negotiation framework of the Uruguay round (Trade Related aspects of Intellectual

Property - see Chapter 6), we discuss the intellectual property issues that have historically obstructed developing countries' efforts to acquire technological capacity in all sectors, and the new measures proposed by developed countries which are likely to frustrate developing countries' efforts to acquire technological capacity, especially through import substitution of technology. The specific issues include:

(a) Whether the multilateral intellectual property treaties and Conventions, that is, the Paris Convention, Berne and Universal Copyright Convention, adequately address the need for correction of the technological imbalance between developed and developing countries, that is, whether the Conventions provide sufficient balance between the production and dissemination of new works and inventions (for example, through economic rights incentives to owners of intellectual property rights IPR's) and promotion of access to and use of these works and inventions, especially by LDC nationals;

(b) Whether the basic theoretical assumptions of the treaties and Conventions adequately balance private entitlements (for example, guarantees of 'economic' incomes and adequate protection for their intellectual property rights) *with* the public interests of developing countries (especially *technology development and control of imports of dangerous or hazardous technologies*);

(i) Whether current international levels of protection for economic and moral intellectual property rights are inadequate, adequate or excessive,

(c) Whether the Conventions are based on a fundamental legal presumption that juridical equality of states translates, inter alia, into *technological and competitive equality* between states and consequently, their nationals;

(i) Whether the current multilateral framework facilitates the selection, negotiation, acquisition of technology by developing countries and their independent development of technological capacity;

(ii) Whether the sovereign rights of developing countries to gain and preserve a balance between their interests (for example, technology development and transfer) and those of intellectual property owners can be exercised effectively under the multilateral Convention principles, for example, to guarantee local disclosure of protected technology in host developing countries and its dissemination after lapse of protection, provide for special regimes or rights for national in relation to particular technologies, product or process categories is being eroded in favour of the economic rights of intellectual property owners,

(d) Whether there is adequate enforcement of the rights and obligations of intellectual property owners, as contained in the conventions;

1.7 International "Trade Related Reform" of the Traditional Framework - Trade Related intellectual property Issues affecting acquisition of technological capacity by developing countries (Chapter 6)

(a) Whether states may exclude from patentability "products and processes, for example, on grounds of promotion of local technological capacity as a matter of development and public interest.

(b) Whether "importation as working" promotes or obstructs acquisition of technological capacity in developing countries.

(c) Whether internationally harmonised periods of duration of protection, for example, as a minimum standard of 20 years would promote, more effectively than territorial standards, development of technology in developing countries (for example, through increased commitments to develop, research and exploit protected intellectual property rights in developing countries.)

(d) Whether use of trademarks should remain conditioned under the law of the granting State, for example, use of a trademark with other trademarks to promote local technology supporting brands;

(e) Whether developing countries should condition grant and use of trademarks, for example, to prevent their use as protective devices for `technological packages' which aim inter alia, at restricting technological flows into the recipient State;

(f) Whether new forms of technological knowledge and skills, for example computer programmes, are to be internationally protected and if so, if the forms of protection (for example, as ideas, procedures, methods of operation or mathematical concepts) restrict the dissemination of usable or state of the art technological information and skills in developing countries;

(g) Whether there is need to protect trade secrets, industrial formulae, product test data (normally protected under laws of confidentiality in some national jurisdictions), etc. held by nationals in developing countries as part of `technology rights'.

1.8 The Real Reform Needs

Whether conventions can be reformed to provide a balanced and dynamic framework that would not only adequately protect intellectual property rights but would also offer more open and less costly access to technology in developed countries for developing countries and deal with specific problems caused by technology rights owners such as abuse of

exclusive rights, that is, refusal to disclose the technology behind protected rights on expiry of protection, exclusive use of importation as exploitation, use of general restrictive practices, monopolistic opposition to compulsory licences, etc.

1.9 Organised International Society - Public or Government Sponsored Multilateral Technological Flows

In Chapters 3 and 4 and partly Chapter 5, the role of multilateral international organisations in the elimination of material disparities between States, through, inter alia, effective facilitation of access to technological and scientific skills for the technologically deficient states, is discussed. The legal role of multilateral institutions in the transfer of public or government sponsored technology and know-how, though involving various legal issues, has relatively remained un-examined. Much scholarship, on the other hand, has been expended on analysis of international technology transfer activity involving private parties (*commercially motivate technology flows*) especially in its economic aspects.

In this work, using the example of the multilateral technological co-operation framework of the United Nations Development Programme (UNDP),[72] *a phenomenon of organised international society*, we examine the international legal aspects of the new international relationships between host or recipient governments, multilateral international organisations, public and private parties and enterprises involved in international technology development and transfer to LDC's. The issues discussed include:

(a) Whether multilateral technological co-operation activity and practice develops and extends international law to the entire process of acquisition of technological capacity by developing countries (that is, technology import, development and transfer or specifically from pre-negotiation, through negotiation and performance to follow up and dispute settlement stages of the process),

(b) Whether multilateral technological co-operation activity is regulated within a permanent and transparent legal framework,

(c) Whether multilateral technological co-operation activity offers:

(i) Adequate and effective balance of commitments between States importing technology and suppliers and recipients of technology,

(ii) Effective legal promotion of preferential and equitable relationships between suppliers and recipients of technology,

(iii) Adequate legal safeguards for the recipient country's interests, for example, to prevent abuse of power by technology suppliers, guarantee consensual and negotiated arrangements, etc.

(d) To illustrate whether, at State level, the international legal principles, rules, instruments, measures, instruments, measures, institutions, etc. if any, which have been developed within the organised multilateral framework have been applied or extended outside the purely multilateral framework, that is, in multi-bilateral,[73] regional or sub regional frameworks, two examples are used:

(i) The legal arrangements for the transfer and development of technology under the Lome Convention (a North - South multi - bilateral agreement)

(ii) The Andean Pact Agreement (a South - South sub regional agreement - Chapter 4).

The principal issues discussed under Chapter 4 include :

(e) Whether these arrangements, reflect any of the principles, measures, instruments, institutions, etc. found under the multilateral technological co-operation;

(f) Whether the multi - bilateral technological co-operation principles, instruments, measures and practice if legally synonymous with those of the multilateral framework, are implemented as effectively, that is, to promote effective acquisition of technological capacity by developing member states;

(g) With reference to the Lome Convention, whether the principle of *preferential (special) treatment* is effectively applied to give access to technology for developing country member States to the Convention and their nationals,

(h) Whether the principle of transparency[74] is observed by all parties, that is,

(i) Whether recipient member States juridical and administrative arrangements to regulate technology imports conform to international law;

(ii) Whether developed member States give adequate *guarantees of technological non coercion* of developing member States and decision making is consensual,

(iii) Whether the arrangements provide for and implement adequate safeguards for developing countries seeking to acquire technology from non State parties who are nationals of the developed member

countries, for example, by eliminating blanket national treatment provisions or requirements that private party activity be regulated only in accordance with anti-trust and competition law principles, as applied in developed member states.

1.10 A Newer Approach ? The Role of State and International Organisation Practice in the Extension of International Legal (norms, principles, rules, standards, measures, instruments, etc.) to The Entire Process of Acquisition of Technological Capacity by States

The evolution of new international legal norms and policies for the regulation of, inter alia, international technology transfer activity through State and multilateral organisation practice remains largely un researched. This is due not only to the sharp traditional demarcation between national and international law (not recognising any continuum between the two), and consequent conflict over hard and soft law, but also to a continuing failure to recognise the essential difference in international law formation process during era of organised international community vis-a-vis that of unorganised international society.

Consequently, the link between development of certain legal principles, rules, mechanisms, etc. through widespread State practice and the incorporation of these new principles and rules into multilateral Conventions, Decisions, Resolutions, etc. dealing with acquisition of technological capacity by developing countries (or transfer and development of technology, in a narrower sense) which in turn, when widely disseminated, has influenced

subsequent State practice, especially in technology recipient States has not received legal scholars due attention. In this work, we discuss, inter alia:

(a) The international rights and obligations arising during a recipient State's regulation of international transfer and development of technology activity, that is, technological activity involving non nationals carried out on it its territory. The extent of a host country's jurisdiction over international technology development and transfer agreements, including protection of rights, non discrimination, compensation, exclusive application of law of host the State to settlement of disputes, etc. is examined.

(b) The rise of the principle of balance of commitments, international laws answer to the elimination of technological disparities between States within a framework of interdependence?

(c) Whether a recipient State has a duty to provide a `transparent' legal regime and the international legal meaning of the principle of transparency as applied to international development and transfer of technology.

(d) The meaning of `right to development', a right of access to technology internationally available, subject only to adequate remuneration for owners, (mainly Chapter 5 and 3);

(e) Whether a general or specific standard of preferential treatment for LDC's seeking to import technology as it has evolved in practice, that is, special, and fair and favorable, etc. standard exists.

1.11 An International Framework for The Regulation of International Technological Activity - The Code of Conduct on Transfer of Technology and its Institutional Arrangements

(a) The need for an international treaty, convention, machinery or institution, etc. for the extension of international legal norms,

standards, rules, etc. to the entire technology transfer process, that is, the need to for an international Code on Transfer of Technology.

1.12 Legal Definition of Technology, its `working' and meaning of Acquisition of Technological Capacity

The traditional definition of technology has been influenced by territorial national commercial interests.[75] The influence of private commercial motivation and interests is detectable even in the United Nations Centre on Transnational Corporations definition of technology as `the stock of knowledge which permits the introduction of new or improved machinery and equipment, products, processes and services, *(adding)* including, in a wider sense, additional elements such as management and marketing skills.[76] This definition of technology, when applied to international technology development and transfer, reinforces certain assumptions, for example, that the mere supply or delivery of technological goods (such as a manufacturing plant) or technological processes, will constitute a technology transfer so long as the parties define it as such.

Legally, a more exact definition of technology is given in the WIPO Licensing Guide[77] as systematic knowledge of the manufacture of a product, or rendering of a service (in industry, agriculture, commerce, etc.), whether that knowledge be in an invention, a utility model, an industrial design, a plant variety, or technical information in the form of documentation, or skills or experience of experts, for the design, installation, operation or maintenance of an industrial plant or its equipment

or for the management of an industrial or commercial enterprise or its activities.[78] This working definition gives the essential characteristics of technology as being:

(i) Systematic knowledge;

(ii) Usefully (not only commercially) *applicable in production, distribution or consumption;*

(iii) Comprised intellectual property rights or human skills usable in production, distribution or maintenance.

1.12.1 Working Definition of International Transmission of Technological Capacity or International Technology Development and Transfer

Since these elements are to be regarded as integral, international development and transfer of technology may be regarded as a process which involves the *supply of systematic knowledge or skills by a State or non State party, for a remuneration, to another State or its nationals, leading to the acquisition, in the recipient State, of a technological capacity in the relevant technology.*

Consequently, it may usefully be reiterated that international supply of technological products, goods or processes which embody systematic knowledge does not, constitute international development and transfer of technology but *a sale of technology, technological goods or processes.* This situation would equally apply even if the recipient, at the time of receiving the good in question possesses adequate know-how to reproduce that good,

since there would then be no actual "transfer" of knowledge, that is, there must be a *"learning element"*[79] and acquisition of the ability to translate acquired learning into products, processes, required technological services. These factors apply whether the technology or technological goods or processes supplied are *civilian or military*, though the latter type of technology flows are not dealt with in this work.

From the foregoing, it can be seen that one of the major causes of misinterpreting the effect of extension of international law to cover the technology development and "transfer" process has been the inclusion of international supplies or sales of technology or technological processes in the definition of international technology development and transfer. The sale or supply of technology or technological transactions, per se, are therefore not necessarily included in international development and transfer of technology, though they may fit into the traditional definition of *direct foreign investments.*[80] We argue that international development and transfer of technology is not constituted by technology supply transactions but by a consensually based process in which the supplying party agrees to promote a specific *technological developmental goal* in the recipient State, that is, international development and transfer of technology agreements must in their aims and objectives be compatible with developmental goals of recipient states and consistent with international legal commitments.

Lastly, the Code of Conduct on Transfer Technology's definition[81] of technology transfer as the transfer of systematic knowledge for the manufacture of a product, application of a process or rendering of a service,

excluding the sale or lease of goods,[82] while expressly excluding sale of goods from technology transactions, does not encompass the need for assimilation of supplied technology by the recipient. Consequently, the Code imposes no explicit duty on the transferor to guarantee that the technology "transferred" is adequately and completely assimilated by recipient, that is the essential condition of acquisition by the recipient, through a learning process, of a systematic capability that completes and constitutes the essence of a transfer, is left to the discretion of transferors. Because of this omission, the need to legally balance foreign technological rights (especially those commercially motivated) with local technology "learning effects" and the general public interest, for example, in relation to health, environment, culture, would therefore, even if the Code were implemented, appear "intrusive" on the legitimate wishes of private parties.

CHAPTER TWO

THE MULTILATERAL INDUSTRIAL PROPERTY FRAMEWORK AND NORTH - SOUTH COMMERCIALLY MOTIVATED INTERNATIONAL DEVELOPMENT AND TRANSFER OF TECHNOLOGY

The Paris Convention System

"This system, which is based on a hypothetical reciprocity and exchange of benefit between member States, when applied, as it is now, to countries with vastly different levels of development, works in favour of the stronger partners and increases inequality...Under developed countries who are parties to the Paris Union find themselves in a position where they have to protect processes originating from highly industrialised countries, without themselves having in fact any processes to protect in those same highly industrialised countries. *This is one of characteristic example, among many, of abstract equality breeding factual inequality.*

The Role of Law in the Process of Development by G. M. ABI - SAAB (1967) at P. 493 - 519. [83]

2.1 Historical

The Paris Convention, is a product of the unorganised international system, based on free market principles and prescribed standards known as the Union standards[84] that largely relate to constraining the State in the measures it takes against foreign patentees, especially in enforcing its economic rights. The problems that the Convention initially envisaged have radically altered since its inception. Though in principle the primary goal or objective of the Convention (that is, the progressive and evolutionary achievement of a high and comprehensive level of protection for inventors) is laudable, the nature of the new problems requires a radical reformulation of the timing, form and content of the 'progressive' achievement of this primary goal.

The lack of a radical shift has made the Paris Convention demonstrably unable to meet the needs of a large majority of its members, that is, developing countries, especially in relation to provision of greater access to protected intellectual property rights at reasonable cost. According to developed countries, for the Convention to remain an effective and progressive instrument, that is, "evolving steadily towards higher and more comprehensive levels of protection for intellectual property rights", it must concentrate on improving the scope and levels of such protection. Not surprisingly, the Convention therefore manifests a *dearth* of provisions that are of strict relevancy to the needs of developing countries in relation to international technology development and transfer.

During the early years of the Paris Convention international trade and exchange were dominated by trade in goods or capital (with international investment largely in extractive industries and raw material processing). The countries that benefited most from that trade and investment expanded originally bilateral treaties amongst themselves for the protection of industrial property into a multilateral treaty, that is, the Paris Convention (1883).[85] The basic principles of the convention were predicated on the juridical and material equality of the member States, that is, relatively even ownership of industrial property rights. The subject matter of protection was defined in accordance with the prevailing nature of international exchange and trade, for example, Article 1, paragraph 3 of the Convention.[86]

Because of the Convention's bias towards promotion of commerce and "reciprocal international exchange" of industrial property rights (held predominantly by private parties) the promotion of technological development in member States or offer of special and differential treatment to technologically underdeveloped members, was alien to the regime, a position still largely maintained today, despite attempts to revise the Convention. Developed countries argue that sufficient special treatment for *techno* - economically less developed States was inherent in the fact that members are bound by the version of the treaty they adhere to and the Convention predicates the application of the National Treatment standard on the treatment offered to nationals, that is, protection is granted only against unjustifiable discrimination and discrimination will not be said to have occurred if a non - national is offered the same low standard of protection as nationals, the so called assimilation to nationals. However, in practice, as detailed below, whichever version of the Convention is binding on a developing country, the developing country cannot effectively implement or maintain measures that are perceived by developed countries as discriminatory.

Developed countries therefore view the current international system for the protection of industrial property as, on one hand, liberal, that is, with reference to the discretion given to member States to, *inter alia*, restrict the scope of rights protected under the Convention as defined in Article 1 (3) and on the other inadequate, that is, with reference to new rights in industrial property or new objects which require protection. They therefore stress the need for strengthening of protection in all countries, especially in developing

countries which offer only minimum standards of protection, exclude sectors or products from protection. The major ground for extension of protection, it may be usefully reiterated, is that the Paris Convention, like the other major multilateral intellectual property treaties, is a progressive instrument which should evolve steadily towards a higher and comprehensive level of protection for owners of intellectual property rights. Accordingly, they oppose, among others, the principle of territoriality as a basis for sovereign determination of patentability, subject and product exclusions, grant of compulsory licences.[87]

Some of the functional principles of international "free trade" which were either presumed or embedded into the convention include those of non discrimination and the ensuing standard of national treatment, the most favoured nation treatment (MFN), and the presumption of juridical and material equality of States which yielded the territoriality and abstract reciprocity principles, respectively. To mitigate the effects of sovereign interests on those of commerce, the priority and independence of patents principles were included. These and other less recognised principles have greatly influenced the reaction of technology owning States and their nationals to calls by developing countries for greater access to technology, whether in the public domain or not, developing country's enforcement of their sovereign rights, for example, by demanding for greater working of patents in their territory, greater transparency and more flexibility in transfer of technology contracts.

2.2 Theories and Presumptions which underlie the Paris Convention's Principles and Standards for Protection Intellectual Property

Basic Theories of Protection

In order to understand why the Paris Convention System is inherently biased in favour of intellectual property rights owners, it is essential to examine the theories and presumption that underlie the system. Without such analysis and understanding, competing theories and interests, such as those underlying development and transfer of technology claims can only be posited as alternatives and not improvements or ways to achieve ultimate aims and goals. However, the main gain from such examination is to show the ascendancy of *economic rights* vis-a-vis moral and other rights of inventors or authors. The theories per se have been examined in detail by many authors and we only deal with each theory briefly.

2.2.1 The Natural Rights Theory

The essential tenet in the natural rights theory of protection of intellectual property, principally developed by French and continental Europe jurists, is the presumption that there is an absolute innate right in all practicable ideas, that is, that every novel idea whose realisation or development can be useful to society primarily belongs to him who conceived it.[88] Two consequences may be said to flow from this position.

Firstly, at the individual level, it was historically argued that inventors should be able register their inventions or designs without previous examination.[89] Theoretically, a denial of property rights in the invention is taken to be a violation of a fundamental human right. International recognition of this consequence of the theory is reflected in the Universal Declaration of Human Rights which provides that:

> "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"[90]

Despite this theoretical recognition, the natural rights theory has gradually given way to the socio - economically based framework theses. While many national laws incorporate the natural rights idea, the innate right to property in ideas, per se, is excluded, with most countries requiring proof of absolute novelty and utility, verified through the search and examination process, before granting intellectual property protection rights. The major recent antagonist of the theory in international intellectual property Conventions is the United States which regards natural rights (and thus moral rights) as inimical to the jurisprudential view point as it has evolved in the United States, that is, that intellectual property rights are freely alienable economic rights.[91]

Secondly, at the international level, with special regard to international transfer of systematic knowledge, the universality of ideas is reflected in the theory that ultimately, technology is the *common heritage of mankind* and promotion of its transfer helps to accelerate development in all countries and thus contributes to the advancement of the general welfare of mankind.

Consequently, most States have recognised the universal human right to share in scientific and technological advancement and a general duty of support and co-operative effort to promote the transfer of knowledge. This latter support is referred to as promotion of the right to development, that is, that no State has the right to appropriate specific ideas to itself indefinitely or arbitrarily restrict the free movement of such ideas among States. Therefore, all States have the duty to ensure the freest and fullest possible access to all available technologies and know-how in accordance with their sovereign right to regulate their socio - economic systems as they deem suitable. The predominance of economic rights therefore means that those States which wish to restrict international technology transfer are in the ascendancy.

2.2.2 Bargain framework or guarantee of income to inventors?

The limited monopoly granted to authors by intellectual property grants is supposed to embody a *quid pro quo* or balanced arrangement intended to serve the public interest, rather than guaranteeing the rights of intellectual property owners.[92] Internationally, this balance is however becoming increasingly upset by the new emphasis on higher levels of protection in all countries, regardless of whether such new levels would be excessive or not. The balance or quid pro quo framework is usually referred as the "Bargain Framework thesis". The thesis has three components. Firstly, that the talent of invention, as an expression of intellectual originality must be given the maximum encouragement by providing the inventor with all necessary stimuli to inventive activity, that is, the *incentive component.* Secondly, the State, in the public interest, offers the inventor a grant bestowing exclusive protection

for a limited period of time, to enable such inventor to display and develop his invention and work it advantageously, that is, the *reward* component theory. Thirdly, that for his part of the bargain with the public, the inventor, after the term for which the patent is granted must disclose his secret and specify his invention in such a way that others may be taught to do the thing for which the protection is granted. This requirement is based on the need for sufficient disclosure in return for the otherwise excessive protection conferred by patent protection, that is, the fact that patents protect inventive ideas which are applicable to industrially useful products or processes even against independent evolution.

While these three ingredients, that is, incentive, reward and disclosure cannot be exhaustively dealt with here, we shall outline their essential relationship to the international transfer of technology process.

2.4 Industrial Property Protection levels, redefining incentive?

Theoretically, as incentive, the State offers inventors a legal monopoly for a limited period of time. The most important form of limited monopoly or protection has been the patent grant. A patent grant does not give a positive right to its proprietor to use the invention but rather only confers the right to exclude others from using the invention for a limited period of time. Consequently, if the granting State, as legislator, is of the opinion that certain technical knowledge should be used under limited conditions only, it is up to it to enact appropriate legislation.[93] This right is preserved under, *inter alia*,

the principle of *territoriality*, which is being gradually eroded,[94] as explained below.

Further, developed countries have increasingly stressed the importance and role of granting exclusive rights (for the longest possible duration) as the most appropriate incentive for the promotion of innovation. The school of thought which traditionally questioned,[95] whether the patent grant is the most appropriate form of maximising individual and social returns from the innovation process has declined with the rise of emphasis on economic rights in intellectual property vis-a-vis moral and sovereign rights. It may be relevant to out that though many developing countries, especially the lest developed, offer lengthy periods of protection for industrial property,[96] the level of innovative activity in these countries remains low. Thus for instance, in the countries member to the African Industrial Property Organisation (AIPO) which includes many Sub Saharan least developed countries such as Burkina Faso, Benin, Central African Republic, Chard, Mali, Niger, Togo, Guinea, the duration of patents is 20 years from the day of registration.

2.5 Disclosure

Transfer of technology is basically transfer of information or systematic knowledge.[97] The international industrial property system is primarily intended to stimulate international innovative activity by facilitating the orderly dissemination of information about innovations, especially through the patent system. Disclosure (description and explanation of the invention)

therefore forms a sharp point of potential conflict between the State and the owner of intellectual property rights. Today, it also constitutes one of the areas of greatest conflict of interest between developing countries which rely on imported technology and major technology exporting States.

By granting monopolies, the State is supposed to secure for the public both the knowledge of the protected invention and its commercial development. The importance of these two aspects, that is, information and commercialisation depends on the level of general technological development of the relevant State. Historically, initial early patents generally contained little information about the inventions. Thus for instance in England, it was not unit the early 18th century when the first patent application containing a detailed specification was filed.[98] Early systems did not impose stringent disclosure requirements on inventors because inventors argued that disclosure offers competitors opportunity to freely use the new invention without investing in the necessary research and development and since infringement was difficult and costly to prove, it was necessary for them to disclose as little as possible in their specifications.

Today, most nations' patent statutes require that the description of an invention be sufficiently clear to enable those skilled in the art to make or use the invention and set forth the best mode contemplated by the inventor, of carrying out his invention. The Japanese law, for instance requires that disclosure must be sufficient to enable any person having an ordinary knowledge in the technical field to which such invention belongs to easily work the invention.[99]

The primary divergence between developing and developed States on the issue of disclosure springs basically from the current function of the international property system in developed countries vis-a-vis that in developing countries, especially the least industrialised. Most developing countries, especially the least developed, are engaged in adapting and diffusing products and processes developed in industrialised countries and consequently, their research, largely in the Aggro - food industries sector, is based on the extension of established designs and processes.[100] Consequently, the primary function of their disclosure requirements, with the exception of a few sectors in the highly industrialised developing countries, is to *encourage local working enable improvements to and diffusion of products or extension of established designs and processes.* This disclosure function in developing countries diverges from that in the developed countries, which is:

(i) To provide direction, (in an atmosphere of rapidly changing technology) to those interested in the exploitation of an invention, to the relevant source of the technology;

(ii) Provide information to competing firms or corporations on the state of the art in the industry; thus allowing them to acquire a picture of the strategy of research and areas of exploitation to be sought;[101]

(iii) Ameliorate the effects of the anti-competitive practice of pre - patenting or the filing of claims before the invention is actually developed;[102]

The Paris Convention, with a pro - patentee position, does not sufficiently take into account this divergence in objectives. Developing countries, especially the least developed which possess weak 'dependent' intellectual property systems, are therefore often unable to ensure sufficient disclosure either through examination or invalidation of grants in order to discover for instance whether matters necessary for the working of an invention were omitted in the specification(s) or extraneous matters which were not necessary to work the invention that made working difficult were included,[103]

2.6 Key Principles, rights and obligations under the Paris Convention of relevance to international transmission of technological Capacity

2.6.1 Reciprocity

Material reciprocity is excluded under the conventions[104] and though it has been argued otherwise,[105] countries of the Union are not expected to apply national treatment to non nationals on the grounds or understanding that their own nationals would in return enjoy the same or similar advantages elsewhere (material or abstract reciprocity), that is, the underlying basis of national treatment is the balance of entitlements (legally defined) and not the imposition or exertion of leverages.

2.6.2 Non - discrimination and National Treatment

The abstract principle of non discrimination which has doubtful roots in customary international law,[106] played a fundamental role in the largely unorganised international trade based on free trade principles. The principle forbids arbitrary differential treatment because of foreign nationality. The principle of non - discrimination was indirectly incorporated into the Paris Convention as the standard of national treatment.

2.6.3 National Treatment

Under the Paris Convention member States are required to grant national treatment and refrain from demanding reciprocity above the limits and extent set out in the treaty.[107] This principle, as provided for Under Article 2 paragraph 1, is said to be the fundamental principle[108] of the Paris Convention, that is, since it sets the *criteria for obtaining protection as well as the scope of rights conferred.* The principle requires that nationals of Union countries and those assimilated to them enjoy in all other countries of the Union the same protection as that accorded to nationals of the State 'granting' rights, that is, member States are required, in granting intellectual property rights to nationals of other member States, to grant all the advantages that their respective laws now grant or will grant in future to their own nationals,[109] without prejudice to the minimum rights provided for by the convention. The principle entitles them to receive the same protection as nationals and the same legal remedies against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with - Article 2 paragraph 1. Similar treatment is accorded to

persons who are domiciled or who have real or effective establishments in the territory of one of the countries of the Union - Article 3. The same principle applies to a large extent, as seen below, under the Berne Convention for the Protection of Literary and Artistic works (article 5) and Universal Copyright Conventions, which offer limited reciprocity.[110] *The uniform application of the abstract principle of reciprocity, as reflected in the national treatment standard, breeds increased material inequality with the ever widening gap in international ownership of intellectual property among member States.*

2.6.4 Territoriality

> "The development of new technologies is normally afflicted with new risks...This means that for each individual invention...possible detrimental effects and risks have to be weighed [by each State] against the merits and advantages aimed at"
>
> **Communication by European Patent Office's examining Division to Applicant for Harvard Mouse Patent. [emphasis supplied]** [111]

To developing countries, the principle of territoriality is a very essential and 'saving' principle. This is due to the fact it enshrines the fundamental right of each State to create, determine the scope, effects and expiration (content) of industrial property rights, in recognition of the State's role as the sole arbiter of its own *primary developmental* interests. This fact is given recognition by the permission of States to determine the subjects and areas of protection, that is, "make exclusions" to exclusive rights. Territoriality is affirmed in provisions contained in the WIPO Model Law for developing

countries on inventions[112] (herein after Model Law), that is, that inventions concerning certain kinds of products, or processes for the manufacture of such products may temporarily be excluded from patent protection by decree, recognises this sovereign right. In practice, territoriality guarantees the granting State its sovereign right to control technology import activity and conform such activity to legitimate primary development goals, that is, the establishment of conditions that balance legal entitlements (return to the innovator or inventor) and *technoeconomic* or social benefits within the host State.

The functions of territoriality are however overlooked or rejected by "economic rights" holders in intellectual property principally from developed countries. Such owners regard the principle solely as a mechanism for enhancing the 'economically inhibitive effect of national sovereignty'.[113] The contrary argument, which we regard as crucial to international trade - technology development and transfer debate, that is, that territoriality does not only imply that States are allowed to regulate their domestic markets and technological[114] conditions (for example by banning imports, granting parallel import rights or even revoking specific rights), but also requires them to refrain from *'conditioning"* other States intellectual property regimes and markets, is increasingly ignored by free trade enthusiasts.

Territoriality is fully conformed to by the principle of national treatment as embodied in the Paris, Berne and other major intellectual property conventions (and even to a large extent as strictly interpreted under Article XVIII of GATT). The resultant effect is to safeguard sovereign nations from

foreign intervention in the regulation of national industrial property systems, except under specific already established conditions.[115]

2.6.5 Rights of Priority

The right of priority is a special right of the convention that is meant to protect inventors extra - territorially. The right protects an inventor or his successor in title who has duly filed an application in his home country for a patent or other right covered under the convention, in other countries of the Union, so long as such inventor makes an application in those other countries within a certain period after the initial application Article 4 (a) (1). During the period between his application in the home State and a valid application in other States, his rights suffer no prejudice. The effect of a claim of priority is that a subsequent filing in any other country or countries of the union before the expiration of the priority period is not invalidated by any acts accomplished in the interval. Publication or exploitation of the invention or the filing of the same subject matter within the priority period cannot prejudice the effects of the filing for which priority is claimed.

Consequently, the right is said to be an inchoate right in foreign member countries that is perfected by the actual filing of an application in individual States. Once filed, the latter application is regarded as filed on the same day as the first and withdrawal, abandonment or rejection of such first application does not destroy its validity to serve as a priority basis. Further, the convention recognises claims based upon multiple or partial priorities, that is, a claim may not only state the priority of an earlier application, but may also

combine the priority of several earlier applications if they deal with different features of the subject matter of the latter application, even if such multiple priorities come from different member countries. In the latter claim, elements for which no priority is claimed may be combined with those for which priority is claimed, so long as, as in other cases, requirements for unity of invention are met.

The right therefore presupposes, among others:

(i) An international system consisting of materially and technologically roughly equal States;

(ii) That rights owners need universal protection of rights, exercisable in any these equal States which emphasise the 'foreign' over the 'international' in their territorial grant;

(iii)International monopoly or suppression of independent inventive activity in other countries is obstructed by slow international communication, difficulty in assessing *technoeconomic* progress in other countries.

The priority right provides an example of a traditional principle that continues to be detrimentally applied under changed circumstances with a resultant effect of concentrating intellectual property ownership, and therefore technology, in a few States. The Model Law provisions relating to the right of priority, that is, "grace periods" and "prior art effect of applications" do not mitigate but enhance the impact of the territoriality principle. Under the grace period provision, under certain conditions, the

novelty of an invention is unaffected by certain disclosures. Under the prior art effect of applications provision, the entire contents of an earlier application that has not yet been published affect the novelty of an invention as if the application had already been published.

Developing countries, especially the least industrialised, depend largely on intermediate technology imports. In these technologies, even new inventions are frequently improvements on existing technology. As was noted in the Vienna conference Report, among others, technological development being cumulative, for most technological imports into developing countries, previous technology is largely developed and held in industrialised countries.[116] Nationals of developed countries therefore naturally hold dominant background rights (for example, second patents, whereby the first patent cannot be exploited without the second) in most technologies. Developing country inventors who wish to exploit their new invention or improvement, cannot avoid incorporating ideas held as background rights by developed country nationals. Thus to avoid committing an infringement inventors in developing countries have to institute international searches. Such searches provide background rights holders with opportunities to monitor technological progress in other countries. Holders of dominant background rights (often multinational corporations) actually carry out research in various countries in technologies in which they hold dominant rights.

Because most developing countries, especially the least developed, lack independent examination systems under which the novelty and inventive step

of an invention can quickly be ascertained, it is often necessary for an inventor in the developing country to have his invention or improvement examined extra-territorially. The above combination of factors means that, using the principle of priority, a developed country national or enterprise holding dominant background rights can, among others, combine use of multiple priorities and pre-patenting practices, to inhibit research and independent technological development[117] in developing countries, cause a licensee in an LDC to accept unwanted "rights" as part of an indivisible package of licensed background rights, thus perpetuating the role of developing countries as markets.[118]

2.6.6 Independence of Patents principle

In the absence of an international patent, an inventor or his successor at law must make an application to the competent national office pursuant to the relevant provisions of that country's laws. Since countries have differing standards of protection, levels of technological development and technological needs, it was thought prudent, in order to protect rights owners, to make a decision to invalidate a patent in a member State ineffective with regard to the legal position of the same patented invention in other member States. Consequently, under Article 4^{bis} of the Convention, it is provided that patents for invention granted in member States must be treated as independent of patents for invention obtained for the same invention in other countries.

Developing countries have opposed the independence of patents rule on the grounds that it opens the door to perpetuation of protection of patent rights in developing countries that have otherwise been invalidated or have fallen into the public domain, in the original granting State. Since many developing countries use non examining systems under which intellectual property rights, (often originating and examined in developed countries) are registered if they are deemed in compliance with formal legal requirements, the arguably the validity or protection of the patent in the developing country should automatically lapse at the same time in the developing country as in the granting State; especially in cases of revocation in the first granting State.

Historically, many of the now developed countries used *national patent laws*, and specifically the parallel patents principle, to prevent the application of obsolete technology by foreign inventors. Under the parallel patents principle, national laws conditioned the abandonment, revocation, forfeiture and duration of national patent grants upon the status of parallel patents covering the same invention in other countries. Thus for example, the United States Revised statute of 1874 provided that:

> "every patent for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years".[119]

Developed countries, especially the United States, disagree with any attempts to depart from the independence of patents principle. Arguably, *inter alia*, the independence of patents protects developing countries from cheap imports since lapse of patent protection in developed countries often

means that many enterprises, largely from developed countries, can exploit such originally protected technology, often exporting or even dumping cheaper products in developing countries often discouraging local working of the relevant competing patents. Ironically, the major ground relied on to justify the independence of patents, that is, differences in levels of economic and technological development, is judged very inadequate to justify differences in scope or levels of protection.

2.6.7 Right of Importation

The Convention provides, for its members who are bound by the pre-1934 Acts, that where the law of a member State confers rights with respect to a product manufactured by a patented process, that State is obliged to grant to the owner of the patent the same rights if such a product is imported into it as those it grants in the case where such a product is manufactured on its territory.

Developing countries have consistently opposed the rights granted under the right of importation since it ignores the fundamental link between protection of intellectual property rights and the effect of imports on the exercise of such rights, that is, the right of importation bestows on its owner the right to exploit his invention extra-territorially and merely import products to satisfy local working requirements.

2.7 Application of Principles;

2.7.1 Patents

Working of Patents, Importation and the Transfer of Technology:

The most important provisions of the Paris Convention that may relate to the development and transfer of technology are those regarding the exploitation of protected rights and the importation of extra-territorially produced goods in place of local working, that is, generally known as *economic rights*. Patentees who have registered their patents in several countries may decide to manufacture or have manufactured the patent subject matter in only one of the countries, particularly their home State, and to prohibit exploitation of the patented invention or process in other countries where they have acquired protection, subject to the legal provisions in those countries. They may thereby control, often detrimentally, the economic development in other States with reference to the subject matter.

Thus the majority of States agree that simultaneous and parallel working of one and the same invention or technology in many countries is not feasible, especially in fields where working requires heavy investment and large scale production.[120] However, it is equally well established that local exploitation of patented inventions is instrumental in the process of acquisition of technological capability, a fact backed by developed countries historical resort to *working requirements*[121] to ensure local exploitation of inventions and works.

Given disparity in technological ownership among and between States, a decreasing pool of technologies in the public domain and a corresponding rise in private intellectual property rights, there is great potential for conflict between private technological rights as represented in the inventors right to his invention, and those of protecting States, that is, the State's right to protect the public interest, nutrition, health, national security. By obliging its members to grant to foreign nationals of other member States, the right they grant to their nationals (under the national treatment principle) the Convention provides a level of protection that is intrinsically pro-patentee, even in its 1967 Stockholm version. The Model Law provides that the owner of a patent has the exclusive right to the exploitation of the patented invention. Exploitation means, for a product patent, "the making, importing, offering for sale, selling and using of the product, or the stocking of the product for the purposes of offering for sale, selling or using; for a process patent, exploitation means the use of the process, or the doing, in respect of a product directly obtained by means of a process, of any of the acts referred to above in connection with a product patent". This provision thus extends process patent protection to products, contrary to developing countries demand.[122]

The Convention allows each of its members to take legislative measures providing for the grant of compulsory licences to prevent abuses that might result from the exercise of exclusive rights, for example, insufficient working or complete failure to work - Article 5(A)(2). This freedom to take legislative measures such as granting compulsory licences is

immediately curtailed. The Lisbon (1958) and Stockholm (1967) texts that bind the majority of developing countries provide that:

(a) A compulsory licence may not be applied for on the ground of failure to work or insufficient working before the expiration of a period of four years from the date of filing of the patent application or three years from the date of the grant of the patent, whichever period expires last - Article 5(A) (4);

(b) The compulsory licence must be refused if the patentee justifies his inaction by legitimate reasons - in practice a subjective condition.

Consequently, where the patentee or his assignee has not taken or is not expected to take, in reasonable time, effective steps to achieve commercial utilisation of the invention or fails to meet within reasonable time health or safety needs, the granting State must tolerate such abuse for three to four years or refuse to grant a compulsory licence to a competent party willing to exploit the invention locally if the patentee then justifies his failure to work with "legitimate reasons". Further, compulsory licensing is opposed in all cases, regardless the *technoeconomic* and social uses of the invention in the granting State.

(c) Such a compulsory licence must be non-exclusive and is not transferable, even in the form of the grant of a sub-licence, except with that part of the enterprise or goodwill which exploits the license.

These well known pro-patentee provisions, as noted above, assume that the patentee is the best qualified person (in terms of resources, skill or

interest) to exploit his invention and that such right should not be denied without immediate recourse to traditional 'due process' procedures or prompt compensation. The provisions effectively block developing countries effective ability to cause mandatory local exploitation of the granted right. These provisions are among those which have been under WIPO revision negotiations for years. On the other hand, parallel reforms initiated by developed countries under the General Agreement On Tariffs and trade (GATT)[123] will, if implemented metamorphose intellectual property rights into trade measures and impose more stringent conditions against the use of non voluntary licences, will circumscribe the State's compulsory licensing rights even further than at present.

Consequently, it may be said that developing countries wishing to prevent abuse of exclusive rights by withdrawing or qualifying protection face an implicit burden to prove, inter alia, that greater benefit to the public will or would result from the discontinuance of exclusive rights, the patentee does not have the incentive to exploit his invention locally, such patentee is not the best qualified person to exploit the invention to meet the granting State's interests, that such exploitation under others would respect or protect confidential proprietary data, technical know-how and other intellectual property belonging to the owner of the invention or his assignees.

Such presumption of limitation on the powers of States has been frequently opposed by developing countries and defended by developed countries. The limitation means that developing countries cannot legitimately follow the historical precedent set by developed States,[124] that is, to

encourage local working of imported and foreign owned technology through the use or threat of use of compulsory or mandatory measures. The conversion of the mandatory measures into ineffective tools, as is now being undertaken in GATT, will mean that patent owners in developed countries would be more likely to manufacture using patented technology in the home States and merely export products.[125] Ironically, despite current opposition to mandatory measures, developed countries current laws contain many examples of resort to *subject matter, process and sector exclusions from patentability.*[126]

2.8.1 Local working or exploitation, demise of corrective powers?

From inception, the Paris Convention faced the question of whether the patentee, among others, must work his invention in countries where he has obtained a patent and in case of failure to work, whether the patent must be forfeited or not. The Convention, in line with its leading members legal philosophy, has always answered the question from a fundamentally pro - patentee position.[127]

Developed member States in the Paris Convention stress the need for observance and possible extension of the present minimum time limits before compulsory licences may be issued, that is, three years, and the preference for the voluntary exploitation by the patentee, his assignees or other party under the contract. Consequently, there has been no positive agreement during the revision conferences about the time limits before the compulsory licences can be issued and the non exclusiveness of compulsory licences. Developing

countries demand for adequate provisions and safeguards which would enable them to effectively implement, among others, special regimes including grant of special patent rights to nationals for particular technological product or process categories, speedy grant and use of compulsory exclusive licences where a patent is not worked or forfeiture of patent rights after five years of non working without prior issue of a compulsory licence,[128] exclusive of products or processes from protection or short duration of protection, but these demands have been frustrated by developed countries on various grounds.[129]

Further, countries taking such measures are increasingly subject to unilateral retaliation by technology exporting States. Further, the developed member States have introduced a *"trade and investment linked"* issue, that is, whether a higher level of development by a developing country should be accompanied by the assumption of a greater level of protection of intellectual property as a reflection of that higher level of development.[130] This issue, among others, has clouded the initial objectives which were declared in the ongoing attempts to revise the Paris Convention, thus slowing down the revision process.[131] The objectives of the revision of the Convention, set out in Chapter 2 above, include among others, orientation of the Convention to ensure that it can promote the actual working of the invention in each country itself, facilitate the local development of technology by and in developing countries, improve the conditions for the transfer of technology from industrialised to developing countries on fairer and reasonable terms.[132]

Mandatory measures, including compulsory licences are increasingly becoming a solution of token value[133] to developing countries. The reasons for this include:

(a) An increase in linkage of international intellectual property issues with other issues such international trade, investment, by developed countries, reflecting a very weak bargaining position on the part of developing countries;

(b) The well known problem of procedural and technical requirements such as the time periods, for example, three years before a compulsory licence may issue;

(c) The non-exclusiveness of compulsory licences which allows patent or trademark owners to stifle local production in the issuing State through imports or the establishment of so called 'screw driver' production plants where virtually all production inputs are imported and assembled in the issuing State;

(d) Exploitation of a patented right under license, assignment or even after purchase or rights, often requires more than the grant of even an exclusive right to exploit a bare patented invention or the acquisition of such bare patent right. This is due, as seen above, to the fact that even new technologies are often improvements on existing technology in which the patent owner holds background patents, thus necessitating the negotiation of technical assistance and other related technical licences agreements before the relevant patent can be exploited under the compulsory licence.

2.8.2 Revocation or Forfeiture

The Paris Convention leaves the determination of the duration of granted patent rights to the legislation of member States, though such duration must conform to the minimum standard of national treatment.

Patents applied for during the period of priority are independent as regards their normal duration and patents obtained with the benefit of priority must have a duration equal to that which they would have, had they been applied for or granted without the benefit of reciprocity. The Model Law on inventions provides for a duration of fifteen years from the filing date of the patent application, with a possible five year extension if the patented is sufficiently worked in the country or if there are circumstances which justify the failure to work the invention.

However, the Convention also provides for the revocation or forfeiture of the patent when grant of the compulsory licence(s) would not be sufficient to prevent perceived abuses. No proceedings for revocation can be instituted before the lapse of two years after the grant of the first compulsory licence, that is, before the expiration of five years from the date of grant of the patent. This provision which is in accordance with the bargain or quid pro quo theory of protection, that is, the primary aim of the grant being to enable the owner to work the invention in a way beneficial to the public, failing which all other privileges lapse,[134] is rarely effectively resorted to by developing countries. The reasons for the absence of use are not hard to find, if the opposition to and conditions for resort to the less stringent measures of compulsory licensing are borne in mind. Consequently, though the threat of or actual use of revocation measures would be useful in preventing the use of purely 'strategic patents' (that is, patents held locally to ensure a market whose holder has no intention of exploiting), the measures are increasingly getting out of reach for developing countries.

2.8.3 Importation

Importation of products manufactured by a patented process, is on the agenda of the ongoing revision of the Paris Convention. The current Article 5 provides that importation by the patentee of articles manufactured in a country of the Union shall not entail forfeiture or cancellation of the patent in the importing country. Developing countries have persistently objected to this provision.

Among the grounds advanced against importation as working, that is, the importation of products of the patented invention or process to satisfy the local market, is that such importation increases the dependency of developing countries on foreign technology by maintaining developing countries as markets or more specifically, that such importation normally continues even where local production is feasible. Further, where compulsory licences have been granted, importation can hinder the local working of the invention process, especially in the least developed countries where enforcement mechanisms are usually extremely inadequate or weak.

Developing countries have proposed,[135] under the revision process, to link importation to local working. Under the proposal, where a patentee does not actually work his invention or process but continues to import, protection would be forfeited, revoked or subjected to compulsory licensing, exclusive or non exclusive. Developed countries repeatedly maintain that where local demand constitutes only a small proportion of total global demand and the invention cannot be worked in small economic units, importation is justified,

unless imports threaten national security or pose material injury to local established or feasible industry or are contrary to internationally agreed or acceptable standards or norms, for example, where they constitute dumping. The compromise solution, that is, to revise the Article so it provides that importation does not constitute working unless the national law of the member State recognises such importation as sufficient to constitute working, has failed to achieve developed country approval.

2.9 Industrial Designs

Industrial designs rights protect the appearance of a product, that is, its aesthetic nature, not its technical details or way of operation. Like patents, they are enforceable against anyone who infringes, regardless of the whether the infringing party independently arrived the infringing design. Industrial designs form a very important aspect in the commercialisation of goods and for purposes of technology transfer, their role is chiefly of "negative" importance to developing countries, that is, that like trade marks (see below) they can be used to restrict access to technological processes, know-how or products, especially in relation to the textile industry[136] and industrial crafts.

2.10 Trade and Service Marks

Most of the above applies equally to trademarks. The Paris Convention (1883) obliges its member States to protect trademarks, that is, signs which distinguish the products offered by an enterprise form those of competitors, as well as service namely, signs which distinguish services offered by an

enterprise from those offered by others.[137] Member States to the Union are free to determine which kind of signs (visible, audible, dimensional nature, etc. may serve as trade marks.[138]

Briefly stated, the grant of trademark protection normally confers on its owner the right to preclude third parties from using the trade mark or any sign resembling it in such a way as to be likely mislead the public in respect of the same or similar goods or services for which the trade mark is registered or from using the trademark or similar sign without just cause in a way which is likely to be prejudicial to the interests of the owner of the trade mark. Where a trade mark is well known to consumers in a country, its owner may preclude third parties from using or registering that trademark or a confusingly similar sign,[139] for identical or similar goods, even if the well known mark is not registered or used in the country by its owner. Third parties may also be prevented from using well known marks or confusingly similar signs except in connection with specific registered goods or services.[140]

Under the Convention, a trademark registered in a Union member State establishes a right in all member other member States to the effect that registration of a trademark in those other member States can be refused only if:

(1) If the new trademark infringes existing marks;

(2) If it lacks distinctive character;

(3) If it violates morality or public order;

(4) Is deceptive; The nature of the goods to which a trademark is to be applied may not form an obstacle to the registration of a mark.

The national treatment principle applies to trade and service marks, that is, the same criteria applied to nationals also applies to nationals and residents of the other member States. Similarly, the right of priority applies to non national's applications for registration of their marks. Countries wishing to use the trademark without the consent of the owner, that is, mandatorarily, may only cancel registration of the mark after a reasonable time on grounds of failure to use, and only if the person concerned does not justify failure to use. The Convention does not provide any standards or norms on compulsory licensing of trademarks.

The importance of trade and service marks in international technology transfer springs from the fact that they are very useful to an owner of intellectual property rights who wishes to form of a package of "indivisible rights" which may include patents, industrial designs, copyrights, etc., protected under one of the constituent parts. Copyrights and trade or service marks are preferred to "tie" the bundle because they are *easier to acquire and last much longer than other rights.*[141] The bundle or package of rights, which may include items in the public domain, is then used by the owner to prevent or eliminate parallel imports, allocate exclusive (monopoly) territorial rights to licensees or assignees of the bundled rights, who are often subsidiaries of the package rights holder, that is, market segregation.

Trade or service marks are thus frequently appended to agreements for the licensing, assignment or even sale of patents and/or know-how, that is because trademarks are associated with the quality of particular goods and the quality of such goods depends on the standards of production which in turn rely on access to, among others, relevant know-how. Under multifaceted agreements, the trademark recipient is often required to mark all its products in accordance with the entire scope of the agreement including quality control, volume of production limits, advertising requirements, etc. This situation results in total control over access to the packaged rights by the owner, elimination of independent evolution of similar technological products or designs already in the public domain (for example, reverse engineering of those parts of ht package already in the public domain) by competitors in LDC's, etc.

Further, trademarks are particularly useful to technology owners wishing to restrict competition or access to their intellectual property rights in that national authorities in developing countries find it difficult, if not impossible to evaluate the actual contribution of a trade or service mark to the overall technology imported. To evaluate the actual contribution of the trademark, some of the more experienced national LDC registering authorities use estimates of the probably profits or price of the goods which incorporate the technology, etc.,[142] but these can be contested by the owner of the trademark. Consequently, a trademark owner can avoid local transparency measures while demanding for better protection of his rights.

In the least developed countries where the recipient possesses, almost as a rule, insufficient bargaining power and/or access to information, the trademark becomes a useful tool for imposing various restrictions on licensees or assignees, without the granting State being legally able to intervene. Thus, control over the actual production activities of a licensee may be ensured by, inter alia, restraining any sale of goods not packaged, configured, designed, etc., in accordance with the usual way associated with the trade or service mark. The trademark owner may impose unwanted intellectual property rights (often justified as necessary to enable supervision and/or control by the owner of the mark over the quality of all products advertised under the mark), require a licensee not to contest the validity of the trade or service mark(s) and other rights granted under the package contract,[143] or actually prohibit continued manufacture (sometimes indefinitely) or sale of the product under the trademark, unless an offending practice or omission is remedied. According to Seyoum's.[144] research, evidence of restrictive practices by owners of trademarks over their licensees in Sub-Saharan Africa is common. Thus for example, prohibition clauses are often included in agreements (even those involving public enterprises where stoppage of production would extend far beyond profit consideration's) with the stated 'explicit' aim of enabling the trademark owner or his representative to inspect the recipient's premises, manufacturing facilities, records, etc., to take samples of raw materials, components of finished products or production records; allegedly to ensure compliance with product quality and standards. Because of lack of transparency in contracts involving trademarks and the difficulty of assessing the exact technological contribution of the trademark or

service mark, the trademark owner frequently has ample freedom to control the recipient's independent development of his own local mark by, *inter alia*, prohibiting contemporaneous development of licensee owned marks through juxtaposition of marks, that is, joint use of both the original trademark and the recipient's own mark on a product.[145] Juxtaposition of trademarks, an otherwise useful tool in the development of independent marks, is consistently opposed by developed countries, especially the United States.

To prevent possible abuse by the trademark owner, some advanced developing countries, such as Brazil have passed legislation under which trademarks cannot be the basis for consideration or royalty after they have reached a certain point in their life. Such provisions are however under threat from the now GATT proposed reforms.[146] Article 18 of the GATT trade related aspects of intellectual property rights Draft provides that after the initial registration of not less than seven years, a *trade mark shall be renewable indefinitely*.

2.11 Dispute settlement under the Convention

Under the Paris Convention, the International Court of Justice is competent to decide on any dispute between two or more States concerning the interpretation or application of the Convention, unless such dispute is settled by negotiations or otherwise. So far, no case has been submitted to the ICJ.[147]

2.12 International Copyright - new dimensions in international technology transfer

This importance of Copyright in North - South technology transfer is undoubtedly rising. This importance arises, inter alia, from the following facts:

(a) Copyrights are obtained under less stringent criteria than patents. Though Copyright protects only the expression of an idea from unauthorised use and does not extend to the protection of such expression from independent creation or confer rights over underlying ideas or functionality, it is of long duration compared to patents and unlike patents which can always in theory be shown to be invalid, copyright in practice cannot be invalidated;

(b) It is not always possible to obtain patents even though development of an idea has been costly or is novel in a commercial or market sense.[148] This applies to computer programmes which are not patentable and many other "information technologies". Copyright however is easily acquired for original computer software processes, technical data, engineering drawings, etc., all of which are gaining great market and international trade significance to their owners, mostly in developed countries, and are of increasing importance in production and the translation of innovations into products, in all countries.[149]

(c) Copyright accords with the drive by developed countries to accord protection to intellectual property in accordance with the economic value or "commercial value" of an innovation or idea, rather than in accordance with strict legal theory or philosophy, for example, protection of moral rights;

(d) Under the Berne Convention, once copyright is granted for a work in a member State, it applies in all other signatory States according to their own laws.

> Such a provision confers great advantage for instance in cases where the owner wishes to restrain parallel imports in various territories. In such cases, the copyright owner - who also holds the original product patent and trademark(s), industrial designs, trade secrets, etc.; or has equivalent rights - would demand for sale of the product in original packaging since copyright extends to designs and words, contained on packaging as well as trademarks and manuals distributed with the product. The owner of the copyright can therefore link all rights, into a *bundle* of indivisible rights, even assignable as a territorial trade right. Technological goods produced by a developing country national or enterprise, for example, after reverse engineering, cannot then be marketed or distributed without violating the copyright protected bundle.[150]

For developing countries, issues of international copyright protection and technology transfer are increasingly virtually inseparable.[151] Both the Berne[152] and Universal Copyright[153] (herein after UCC) Conventions have *subsumed* the knowledge or information needs of developing countries under the need to preserve the rights of authors and the level of protection accorded to them. Before the 1971 revisions of both Conventions[154] they contained no effective special or differential provisions to deal with the recognised problems of developing countries in getting access to information for purposes of scholarship, teaching and research.[155] Though

the scope and content of the economic and moral rights of the author (for our purposes mainly reproduction, translation, adaptation and broadcasting) was left to each member State subject only to national treatment and other minimum standards, the progressive extension of the exclusive rights of the author remained paramount. Thus as Ricketson notes:

> "Up to the time of the Brazaville meeting,[156] however, the preparatory work for the Berne Revision had taken no account of the problems of developing countries, and had been essentially concerned with the question of raising the level of protection offered by the Convention. Indeed, at this time, the major issue for the forthcoming revision was thought to be the achievement of a uniform regime governing cinematographic works"[157].

The Stockholm Protocol (1967)[158] which had been meant to enable developing countries to adopt certain reservations (vis-a-vis adoption of wider restrictions on the rights of authors[159] which was categorically rejected by developed countries) had been rendered ineffectual by developed countries refusal to ratify it,[160] on the grounds, *inter alia*, that:

(i) In theory, according to developed countries, a developing country could use the Protocol provisions to lower protection below the acceptable minimum standards or even deny an author's rights entirely.[161] This arose, it was argued, because the Protocol sought to lower standards of protection, contrary to Berne Convention provisions. To developed countries, the preservation of Berne standards was paramount, as the inclusion of a safeguard clause,[162] in the UCC (1952)[163] Article XVII, indicated. Under the safeguard clause, a party acceding to the UCC, accepts, on accession, to grant no protection to those States which have withdrawn from the Berne

Convention, and for States party to the both Conventions, the Berne Convention Provisions prevail.

In rejecting the Protocol, developed countries further argued that Berne Union member States can only enter into special agreements among themselves only in so far as such agreements grant to authors more extensive rights than those granted by the Berne Convention or contain no provisions contrary to the Convention. The Protocol, it was claimed by developed countries, violated these requirements. Further, it was said that the Protocol violated the copyright owner's right to decide, like the owner of any other property, when and in what form and place his work was to be used (economic rights) and to object to its misuse (moral rights).[164] Most importantly, the Protocol was to form an inseparable part of the Berne Union, contrary to the wishes of developed countries.[165]

The "negated" Protocol, would have enabled developing countries, *inter alia*:

(i) To reduce duration of protection from fifty to twenty five years;

(ii) To terminate translation rights which remained unused after a given period of time, that is, ten years from the date of publication of the original translation.[166] This right of termination was however of little practical value to developing countries since the said translation could take place in any member country of the Union and the developing country would then have to sustain the economic burden if importing copies of such a work.[167]

(iii) To translate and reproduce protected works under compulsory licences in return for equitable payment;[168]

(iv) To restrict protection in order to enable the use of protected works for teaching, research and study in all fields of education.[169]

According to developed countries, these concessions were unjustifiable. Particularly, it was argued that if the Protocol was implemented, authors would have no guarantee of payment in cases of use for teaching, scholarship and research. Developing countries, ambiguously defined, would be free under the Protocol to export copies of reproduced or translated works to other developing countries and would have no incentive to improve the level of protection beyond that offered by the Protocol.[170]

2.13 Post - 1971 Paris Revisions of the Berne and UCC Conventions

Provisions governing preferential and special access to protected rights by developing countries:

The impasse that was reached after the non implementation of the Stockholm proposal was supposed to be eliminated by the 1971 Paris revisions of both the Berne and UCC conventions.[171] However, the reservations that developing countries were allowed to make under the Paris revisions are greatly more restricted than those which had been envisaged under the Stockholm Protocol. The "favourable compulsory licensing" provisions are laid down under articles Vbis, Vter and V quater of the UCC

(1971) and the parallel provisions of the Appendix to the Berne Convention (1971), respectively.[172] These "favourable" provisions are then hedged around by an extremely complex and detailed set of exceptions and restrictions. The result renders the Berne Appendix longer than the Act itself. As Ricketson notes, "the detail of the compulsory licences allowed under the Appendix contrasts strangely with the general compulsory licences provided under Articles 11 bis and 13 (1)."[173] The Paris revisions allow for the use of non - exclusive licences, which are non - transferable and are granted in return for due remuneration, for the exclusive purpose of teaching, scholarship and research or systematic instructional acts. Remuneration is to be in conformity with the scale of royalties paid in freely negotiated licences between two persons in the countries concerned. Copies of titles are not, normally, to be exportable.[174]

To ensure maximum compliance with Berne standards after the revisions, developed countries ensured that no new member State to the UCC could, after the coming into force of the new convention, accede solely to the 1952 Convention, that is, a State acceding to the 1971 UCC Convention automatically became party to the 1952 UCC Convention. However, where two States belonged one each to the 1952 and 1971 versions of the Convention, relations between them would be regulated under the 1952 version of the Convention. These provisions were justified as ensuring non discrimination between developing States that were at the time of the revisions (1971) members of one of the Conventions, and those acceding to the new Conventions (the revisions contained, in the case of the UCC, higher minimum standards than the 1952 version). To avoid non - ratification and

ensure harmony in implementation of the new revisions, an unusual cumulative condition was included in the ratification procedure of the Berne Appendix which required that *specific member States*, that is, France, Spain, the United Kingdom and the United States should become bound by the revised text of the UCC Articles 1 to 21 of the Berne Convention[175] and Appendix did not enter into force until three months after five member States had ratified the Paris Act without making a declaration under Article 28(1) (b).

The revisions were supposed to achieve a balance between the legal entitlements of authors the equitable needs arising out of the development process in LDC's. Briefly stated, the post 1971 multilateral Copyright protection system would in the main ensure:

(a) That developing countries could apply the same level of protection to foreign works, whether covered by the Berne or UCC;

(b) That developing countries could not be prevented from leaving the Berne Convention (suspension of safeguard clause, Article XVII UCC, in case of LDC's;

(c) The minimum level of protection provided by the UCC was raised, to counter balance the suspension of the safeguard clause in the case of LDC's;[176]

(d) The least developed States educational and cultural needs would receive special attention;

(e) Except for duration of protection, material reciprocity was not to apply to the compulsory licensing system, that is, the developed countries were to continue applying the national treatment standard by giving equal protection to works from LDC as they

gave to those of their own nationals. The Principle was included in the Appendix to the Berne Convention as Article 1, paragraph (6), but is only implicit under the UCC.[177]

Below, we assess to what extent, if any, most of these objectives have been fulfilled. As already stated, in *technoeconomic* terms, copyright is of increasing importance to developing countries seeking to use imported systematic knowledge (technology) to establish local technological innovation systems, translate such innovations into products and processes, boost local production, etc.[178] Real access to such systematic knowledge, including state of the art knowledge, through copyright(s) granted on favourable and special terms, will in future play an increasingly greater role relative to patented knowledge. However, the threat of increased use of *leverage,*[179] protection of "commercial" copyrights, as incentive to copyright owners, maintenance of markets and market lead times, etc.; threatens to eliminate the limited LDC gains[180] since the 1971 revisions at Paris. We concentrate on the provisions under the revised UCC (1971) - articles Vbis to V quater, because they are substantively in line with those of the Berne Convention Appendix and analysis of both Conventions would entail unnecessary duplication[181] Berne Convention Appendix parallel provisions are cited whenever relevant. All references to the UCC, herein below, apply to the 1971 revised version, and Berne Convention references, apply to the Paris version (1971), unless otherwise stated.

2.13.1 Eligibility under the Revised Convention

There are two (apparent) standards set down in the Conventions for countries that want to take advantage of the provisions allowing restriction of the exclusive rights of authors.

The two standards are:

(a) That any contracting State to either the UCC or the Berne Union[182] Convention is considered a developing country in conformity with the established practice of the United Nations General Assembly - Article V bis 1 UCC. The standard has been criticised as vague, not setting out specific criteria for determining exactly which countries may be regarded as developing and therefore eligible. The Main Committee II at the Stockholm revision conference,[183] that is, that "established practice" implied that the country in question received assistance from the United Nations Development Programme through the United Nations or one of its specialised agencies, is of little value when account is taken of the fact that many developing countries, especially the advanced ones, may contribute to, as much as they receive, from such sources.[184] This test therefore has to be simultaneously or concurrently applied with the next one below, that is, whether the country in question considers itself a developing country for the purposes of using the Convention's provisions.

(b) This second test, much more difficult to assess than the first, requires that a country *decide* whether, in view of its "economic" situation, social and cultural needs, it does not consider itself immediately in a position to make provision for the protection of all rights as provided for in the Convention. The obvious danger here is that "self - evaluation" may be difficult due to rapid changes in *technoeconomic* and other circumstances, making some States to take undue advantage of the provisions.

However, apparently, simultaneous application of both tests balances sovereignty, State responsibility and national and territorial interests against the collective interest and international consensus. Thus a State may not arbitrarily declare itself eligible without corresponding recognition from the majority of States as being in such need. This process therefore ensures negotiated "graduation" of developing countries from the scheme, rather than arbitrary or "leveraged ejection" while also eliminating unjustifiable claims. In practice, "notification" of the need for use of the reservations at the time of ratification is normally sufficient.[185] Under the Berne Convention, the developing country may choose between the procedure under Article 1(1) and that of the ten year period provided for in the Paris Additional Act (1896) which allows the extinguishing of exclusive rights of an author if after ten years no translation of the original has occurred into the language of a country availing itself of the facility.[186]

2.13.2 Termination of right

Once an LDC ceases to be regarded as such, it becomes ineligible to renew the ten year notification or to avail itself of the exceptions as from either the end of the "current ten year period" or three years after it has ceased to be regarded as a developing country, whichever period expires later.[187] The criteria for graduating a country from the scheme are not clear. Under the new GATT - IPR reforms, developed countries have attempted to establish criteria based on the export performance (often sectored) of a developing country. This approach, which threatens to reinterpret the criteria for graduation, especially in the case of the newly industrialising countries[188]

does not consider whether the country in question has achieved overall technological capacity and if so whether such capacity is in balance with cultural, social and economic needs.

Specific Rights:

2.13.3 Translation Rights

Developed countries have been more willing, especially in very recent times (Uruguay Round),[189] to allow the limitation of the authors exclusive right to translate vis-à-vis the limitation of the right to reproduce or distribute. The very recent lack of emphasis on moral rights, traditionally defended by continental European States, especially France, indicates, as already stated, the ascendancy of the United States view of copyright as a freely alienable economic[190] right and not a natural right.

The exclusive right to translate - Article V (2) UCC (1952),[191] is the exclusive right to the integrity of his work or to the correct translation of his work. It is therefore essentially a moral right. The Tunis Model Law, section 5(2), provides that the author has the right "to object to, and seek relief in connection with any distortion, mutilation or other modification or derogatory action related to his work where such action would be prejudicial to his honour or reputation. Due to the difficulty of assessing the nature, this right, it would, if rigorously applied, give a blanket right to authors to restrict almost any activity related to their work. Increased emphasis was laid by some developed countries on this right, especially before the Uruguay Round,

allegedly in order to cub mass "fragmentation of copyright" or illegal translation and transmission of protected works, especially through use of new (communication and information) technologies.[192]

2.13.4 Translation Licences, eligibility and scope

Translation rights are granted to developing countries which comply with the requirements set out under Article Vbis 1 of the UCC 1971[193] The licence rights are much more restricted than those originally envisaged under the unratified Stockholm Protocol. The licences are granted only for purposes of teaching, scholarship or research.[194] Among the most notable restrictions on non voluntary licensing that would affect efforts to promote technology transfer, either through improved dissemination of works or grater application of new ideas to improve local technological capacity are the provisions that:

(a) The licences are non-exclusive and non-transferable, that is, purely personal to the licensee;[195]

(b) Translation licences apply only to published works, that is, copies must be available in readable form. Consequently, among others, non compulsory licenses exclude almost all new forms of information, for example, computer data bases and software, sound recordings, television, video-grams, cable, etc.;[196] *Note* - Translation for research purposes is only to teaching or dissemination of results to specialised technical or scientific research to experts in a particular field, but excludes industrial research institutes and private undertakings;

(c) Where the author has withdrawn from circulation all copies of the work, a compulsory licence cannot issue;[197]

Further, such limitations obstruct development of informatics industry[198] in LDC's, their ability to utilise information especially in the development of national technical or scientific research curriculum's[199] or disseminate knowledge to nationals involved in specific productive and developmental activity, etc.

2.13.5 Time Limits and other restrictions on translation licences

Time limits or waiting periods for translations are under the UCC (1971) set up in a 3 tier system synonymous with that under the Berne Appendix. Translation licences may be issued, where after three years or such longer period as may be determined by national legislation, a translation of a work remains unpublished in a language in general use in a member country of the Union.[200] Translation licences may also be acquired for works that are out of print, or those published in languages that are not in general use in one or more of the developed countries' member to the Union.[201] However in terms of technology transfer, the most important limitation is that imposed when a developing country wishes to reduce the period before translation licenses can issue to one year or less. In such cases, there must be unanimous agreement by all the developed countries in which the language to be translated is in

"general use".[202] This restriction has various effects, that is, *technoeconomic* and political. Technological advancement may be restricted since the short time period does not apply where the language in question is French, English or Spanish, that is, the major languages in which most works of immediate *technoeconomic* value to the majority of LDC's are published. In addition to the above, protection of the private rights of authors is reinforced by further time limits. Thus, a licence may not be granted until six months[203] after the applicant has complied with the required procedure, or nine months[204] in cases where the address of the owner of the licence right is unknown. During these six or nine month periods, no licence may be granted if a translation in the language in respect of which the licence application was made is published by the owner of the published right or with his authorisation[205] (in any member country of the Union).

2.13.6 Reproduction Licences

The permission to reproduce works on concessionaire terms is vital to LDC's in their use of information to adapt, develop and disseminate imported technologies. Reproduction rights are supposed to mitigate differences between LDC users and the owners or holders of rights, especially in relation to bargaining power (caused *inter alia* by unequal access to resources and information regarding transfer of rights), royalty payments etc. The right to reproduce should guarantee that protection is used for more than facilitation of importation of foreign works.[206] However, developed countries exclusively focus on the potential of reproduction rights to deny

authors the opportunity to reproduce and freely alienate their own work, enter into the execute contracts in relation to such work, etc.

2.13.7 Criteria and conditions for obtaining compulsory licences

These parallel those for translation licences but are even more restricted. Reproduction rights may be obtained, generally, upon the expiration of five years.[207] Compulsory licenses to reproduce are only granted after the latest edition of the work has expired. Like with translation licences, the right to reproduce can only be acquired if the owner has failed to put copies of an edition of a work on the market at a reasonable price (defined as similar to that normally charged for the same or related work in the requesting State).[208] The purpose for which a licence is granted is very restricted, being limited to "systematic instructional activities",[209] which excludes reproduction for purposes of research, distribution of copies produced under licence to the "public" in the granting country, etc.

2.13.8 Science and technology as "exceptions" to the five year period

The five year period does not apply to works the natural and physical sciences, including mathematics and technology. Instead a three year period applies,[210] while a seven year period applies to works of fiction. While the three year (shorter) period for technical and scientific works is supposed to meet the needs of LDC's, this provision i of little practical value. This is due to, *inter alia,* the current and foreseeable rapid nature of scientific and technological change, the imposition of a dichotomy between technical

knowledge and its social - cultural basis, which renders LDC's prone to "blind" import of technological and scientific ideas, etc. Developing countries are consequently left import dependent especially due to consumption of near obsolete information technologies, are made vulnerable to the application of technologies of "unknown" social - cultural effects[211] or even environmental effects. Export of reproduced copies is strictly forbidden, as in the case of translations,[212] with few exceptions[213] which centre on exports to nationals.[214] Such provisions are detrimental to joint regional cooperation efforts in, *inter alia,* science and technology development.[215]

2.13.9 Termination of Right

The right terminates when the owner, or somebody who is duly authorised by him puts on sale, at reasonable prices, copies of ht work on the national market to meet the requirements of the general public for systematic instructional activities.

2.14 Undetermined Issues and Preliminary Conclusion

The Paris Convention is inherently aimed at the protection of intellectual property rights against "granting State control". Because the Convention predates the current international development crisis and the international development gap, it remains based on a very weak (private individual and commercially oriented) perception of the nature of technological innovation and change. Consequently, efforts to revise the Convention have faltered or even been reversed.[216] The Convention therefore contains virtually no provisions or mechanism to correct

technological and material inequality between States. At the enterprise or contractual level, developing country nationals seeking to select, acquire and adapt foreign patented technology and related know-how directly related to and immediately applicable to their operations, face terms and conditions unilaterally determined, set and maintained by developed country nationals who own the majority of increasingly absolute intellectual property rights.[217]

Consequently, many issues remain unresolved or un-addressed. These include:

2.14.1 Patents

Sovereign rights vis-a-vis Intellectual Property Rights:

To what extent should a State exercise or refrain from exercising its sovereign powers in order to ensure performance of its primary duty and responsibility, that is, to ensure its *technoeconomic*, social and cultural development. Similarly, the issue of whether duration of protection should have a harmonised international minimum standard, that is, 20 years or be a matter for domestic legislation, is unresolved.

Scope and Duration of Rights:

The extent to which parties may exclude, from patentability "products and processes, on grounds of public interest, national security, public health

or nutrition, (including food, chemical and pharmaceutical products and processes), etc.

Working versus Importation:

Whether if working includes importation, such working is compatible with the acquisition of technological capacity by developing countries, especially the least developed.

2.1.4.2 Trade Marks, Industrial Designs, Extra

Because trademarks are primarily concerned with finished products, they have traditionally had little relevancy in connection with international development and transfer of technology. However, they are increasingly used in combination with other intellectual property rights, that is, as part of a package, when they can be actively used to influence the terms and conditions under which an LDC national selects, acquires, adapts or disseminates any technology. Even more importantly, they can be used to prevent the acquisition of an independent technological capacity by the recipient. The issues that will therefore have to be addressed include:

Whether trademark use should be conditioned under law of granting State, for example, use with other trademarks, use in special form or under multilateral instruments and whether duration of period of non use, uninterrupted or not, before cancellation of trademark and what constitutes valid reasons (a subjective standard) for non use of the trademark

2.14.3 Copyright

The complexity of the compulsory licensing provisions which is meant to guarantee protection of private rights, has thoroughly defeated the original purpose of the Paris reforms, that is, to ensure access to information and systematic knowledge on fair and favourable terms for developing countries. As in the case of the Paris Convention, few developing countries have been able to use compulsory licensing provisions at all. By requiring them to increase protection for copyrighted works, developed countries seek to deny developing countries the opportunity to create and develop effective intellectual property institutions. This is due to the fact that a country's interest in protection depends primarily on the size of its own intellectual property pool, the contribution of intellectual property to its *technoeconomic* and social cultural development and the perceived goodwill of other States. Unlike the unratified Stockholm Protocol, the UCC revised provisions and the Berne Appendix are balanced against LDC's to the extent of being of only token value in facilitating the acquisition of technological and related information by developing countries, especially the least developed among them.

CHAPTER THREE

The Multilateral System and the Transfer of Technology to Developing Countries, the Example of the United Nations Development Organisation (UNDP), Issues of International Transmission of Technological Capacity to Developing Countries and a New International Order

The role of the United Nations Development Programme (herein after ***UNDP****) in the acquisition of technological capacity by developing countries through, inter alia, international technical* cooperation, *provides a unique model for the adaptation of international institutional arrangements and the multilateral legal framework to ensure that developing countries effectively participate equally in international technoeconomic* cooperation *decision making and implementation of the resultant decisions, within framework provided by the* ***UNDP*** *and its related specialised agencies, in relation to acquisition of technological skills, among others, by member States, is a proximate framework treaty, that is a framework that is designed to deal with complex and dynamic technological skill transfer practices or relationships between State parties and their enterprises through a framework that allows continuous adjustment of agreed rules, through new decisions, resolutions, procedures, etc. This feature of* ***UNDP*** *law making is characteristic of the new organised international community's progressive law formation processes that do not fall into any clear category of Article 38. The new framework arrangements have promoted the opportunities available to developing countries to:*

(i) Choose and formulate their own technoeconomic priorities for development;

(ii) Acquire external technoeconomic support through a contractual and equitably negotiated settlement i.e. a multilateral legal process (substantive and procedural) which involves, among others:

(a) A request for external assistance by a potential recipient State;

(b) Offer of assistance by the ***UNDP****;*

(C) Consideration of offer by recipient State, including opportunity to reject offer;[218]

(d) Conclusion of negotiation:

(e) Performance of negotiated agreement under transparent legal terms and conditions - multilaterally agreed, with automatic safeguards for maintenance of sovereign rights of a recipient State to determine its needs and interests;

(f) Performance and follow up of any request in accordance with agreed legal terms and conditions;

(g) Offer of special and preferential treatment to the least developed recipient countries through specific formal legal mechanisms and instruments such as the special industrial services programme, special measures fund for the least developed countries and "round - table process", while maintaining balance of commitments amongst all recipients in accordance with the principle of universality.[219] *This unique feature is ensured by, inter alia, promotion of mutual self help among parties, reciprocal participation (colloquially referred to as "those who receive also give"),*[220] *use of the net contributor mechanism,*[221] *etc. Consequently, programme activities enhance* cooperation *and reciprocity rather than unilaterally imposing aid or assistance;*

(h) Settlement of disputes under transparent procedures and provisions with the objective aim of ensuring achievement of agreed legal objectives;

(i) Promotion of mutual self help (i.e. self help by the amongst recipient States) in order, amongst others to ensure that the international collective interests are incorporated into the cooperation *process and adequately addressed by the developing countries; etc. without departing from multilateralism, collective interdependence and preservation of each members sovereign rights and duties.*

*Below, we examine the legal substantive and procedural "*coordination *table" or framework treaty type of arrangements i.e. multilateral legal machinery, instruments, measures, rules and standards that* ***UNDP*** *member States have established to promote the transfer of technical knowledge and skills to LDC member States on a fully negotiated, consensual, equitable and co-operative basis. The other purpose of this chapter is also to highlight the factors that are inter linked or related to international development and transfer of technology i.e. as we cited Schneider in the introduction above, no problem of international law can be viewed realistically without considering it within its political economic, sociological,* ***scientific and technological*** *context,. Similarly, no solution to the problem can be achieved which does not accommodate these realities.*

The Origin of the International Technical Co-operation Multilateral Framework

International technical co-operation as a permanent aspect of inter- State relations was in built into the United Nations Charter. Under Article 56 all members of the United Nations pledged themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth under Article 55. Article 55 calls for States to co-operate, *inter alia*, to create conditions of stability and well-being, on the basis of the principles of equality and self-determination. Such co-operation, for our purposes, is the promotion of access to science and technology for all States and peoples.

To meet the newly recognised international development needs, the countries member to the United Nations created the Expanded Programme for Technical Assistance (**EPTA**)[222] and the Special Fund (**SF**). The merger of these two bodies, with provision for the continuation of their underlying principles to form the United Nations Development Programme (**UNDP**), showed a commitment by all member States of the United Nations to co-operate, thorough, *inter alia*, technical co-operation and assistance, *to reduce material inequalities between and amongst them*. This commitment is to date the only highly effective means for facilitating the acquisition of technological skills by developing countries.[223]

3.1 The Expanded Programme of Technical Assistance (EPTA)

EPTA was created in 1949 and was the first concentrated large scale effort by the United Nations system to transfer technical knowledge and skills to

developing countries through, *inter alia*, the provision of expert advice and fellowships.[224] The programme derived its substantive basis largely from United Nations General Assembly Resolutions, 200 (III) of 1948 on technical assistance in the field of economic development, Resolution 418 (v) of 1950 which called for the institution of advisory social welfare services and Resolution 723 (VIII) of 1953 which set up the public administration programme and the Economic and Social Council Resolution 222A of 1949 which set forth the operating principles for the programme and provided for its organisational nature.

Under **EPTA**, expert assistance, fellowships and equipment was provided through a central pooling of government *voluntary* contributions. The *timing, value and size of the contributions and their non-guarantied nature* were a problem from the inception of the programme. Use of pooled resources was supervised, controlled and guided through the Technical Assistance Board (TAB),[225] an inter-organisation or agency body without autonomous legal personality. The board consisted of representatives from the secretariats of the participating agencies and an executive Chairman appointed by the United Nations Secretary General in consultation with the participating agencies that received allocations from **EPTA** to finance technical assistance projects. Each of the participating agencies executed its **EPTA** funded project according to its "formal relationship" or agreement with the programme, its own constitutional powers and objectives and wherever relevant, the nature of the project.[226]

The agreements between **EPTA** and the agencies gave rise to established practice and principles that were later incorporated, with appropriate modifications, into **UNDP** practice. The Economic and Social Council (ECOSOC) set forth

clearly, under Resolution 222A (IX) of 1949, the operating principles along which **EPTA** was to operate. The resolution recognised the future role of international technical co-operation in promoting international exchange of technical knowledge among countries with varied experience, differing social patterns and cultural traditions and at different stages of development. The promotion and guarantied continuation of international technical co-operation was however dependent on:

(i) Assistance to requesting States was under *negotiated agreement, that is, it was not imposed;*

(ii) The negotiations were *formal* and *legally binding.* Thus technical assistance agreements concluded under the expanded programme (initially referred to as "Basic Agreements" and later as "Standard Agreements") contained specific terms for the implementation of each project; with administrative arrangements dealt with under supplementary agreements or mutually agreed programmes of operations contained in notes exchanged between the recipient Government and the agency or agencies concerned.

3.1.1 The Standard Agreement under EPTA, a unilateral instrument?

These agreements, forerunners of the current Standard Basic Assistance Agreement, embodied the general rules governing provision of technical assistance by all organisations participating in the expanded programme, the obligations of requesting States and the rights and duties of the parties involved.

The agreements have incorrectly been regarded as examples of "contrat d' adhesion"[227] i.e. a type of contract with conditions and terms unilaterally determined in advance by one party, the terms and conditions of which are then offered to the other party without an opportunity for the accepting party to effectively negotiate or discuss. The accepting party therefore accepts or rejects them in toto without a future option of re-negotiation.[228] This categorisation of the standard agreement as a "contrat d' adhesion" is based on examples of "unequal" bilateral treaties[229] or of contracts entered into and regulated by national contractual and other relevant national laws, for example, contracts of employment between individuals and public or private corporations purchase or hire of goods and/or services etc. which are, due to the grossly disproportionate bargaining and negotiating powers of the parties, are characterised by *standard terms adapted to the subject matter involved and the unilateral or special wishes of the dominant contracting party.* Under such treaties or contracts, the weaker State or contracting party often has no power to negotiate or re-negotiate the terms of a unilaterally drawn and regulated agreement which is normally likely to be detrimental to such weaker parties interests. However, extension of "unequal" treaty or standard contract arguments to multilateral arrangements whose implementation is not regulated by any State or group of States, is misleading.

3.1.2 Refutation of Standard Contract analogy

The standard contract analogy is largely based on the nature of decision making under the target figure system. The Technical Assistance Board estimated the amount of funds it expected to have during the next two years from the relevant time, setting sixteen per cent apart for regional programmes and the rest into amounts spend-

able in each State. These figures, known as target figures, were sent to the Governments which submitted, for each project, the expected duration, main objectives, cost of expert services, fellowships, the counterpart facilities it expected to provide and the way(s) it would continue when outside aid was withdrawn. Criticising the system of target figures as restrictive, a representative of the French Government was of the view that "when available funds were distributed by the organisation rather than in accord with recipient's needs and preferences, a rational programme of development priorities could be set only by rare coincidence".[230]

However, despite its use of target figures, EPTA was in practice favourably perceived by developing countries as within the United Nations operating principles such as equality and universality[231] that are indispensable to the preservation of inter alia, jurisdiction and sovereignty over natural resources, Choice of national development priorities, successful international development cooperation, etc.

Various legal factors distinguish the international law regulated multilateral agreement, such as the Basic Agreement (or its successor the SBAA) from "unequal" treaties or the national law regulated standard contract. Some of the features are that:

(a) The Basic Agreement contains provisions which reflect the specific multilateral objectives which the member States expect the institution to implement.

(b) The international institution that has specific powers and competency's bestowed on it by member States has the authority and properly exercises that authority if it enters into international commitments necessary for the attainment of the objective(s) even without

express consent by its member States.[232] Consequently, international agreements in "standard contractual form" form a legitimate basis for the implementation of agreed "consents" of member States which in this case are consents which expressly empower and require the organisation to provide for international technical co-operation to promote development in the requesting States.

(c) Under the rotational system, a requesting State, as a member of **EPTA** was effectively *represented* on the Technical Assistance Committee (or the Governing Council in the case of **UNDP**). Such representation enabled the potential requesting State to negotiate and influence the "framing" of members' objectives into standard agreements based on the principles of equality or parity.[233]

(d) Assistance offered by the programme was complementary to development plans and priorities of the requesting State and the recipient State could change the terms of its country programme or project(s) if it showed over-riding need, through negotiation with the Programme and so long as such change would not be discriminatory to other member States.

(e) While standard terms under a national contract (or bilateral - multilateral agreements)[234] may often reflect the special interests of the dominant party, the objective of standardising terms under multilateral arrangements dealing with highly complicated subjects and relationships between numerous parties is to "stabilise" the definition and implementation of "agreed" principles, standards, rules and procedures and therefore compliment beneficiary members efforts to achieve their objectives rather than merely restrict their sovereign rights.

(f) The Basic Agreement provided for "peaceful settlement" of disputes in cases where lacunae existed in the agreed provisions. Settlement was to be made in accordance with the relevant resolutions and decisions of the Assemblies, Conferences, Councils and other organs of the United Nations organisations. Each party had to accord full and sympathetic

consideration to any proposal for such settlement advanced by the other party.[235]

3.2 The Special Fund

Before the formation of ht Fund in 1958, developing countries had made unsuccessful attempts to establish a special United Nations Fund For Economic Development (SUNFED).[236] SUNFED would have provided assistance on "continuous" basis in areas that encourage integrated technical, economic and social development of developing countries thus creating conditions conducive to investment as provided for by, *inter alia,* General Assembly Resolution 1240 (XIII), paragraph 1. The pre-investment projects funded by SUNFED were to assist the developing countries to perform comprehensive surveys of their natural resources, programmes of vocational and technical training, establish local research institutions etc. The SUNFED proposal was rejected by vote in the General Assembly[237] due to opposition from some major developed countries, on the grounds, *inter alia,* that a developing country controlled development institution would be unable to meet high performance standards in resource distribution and that there was no shortage of funds, only effective capacity of Developing Countries to absorb such investment.

When the Special Fund (SF)[238] was formed, the developing countries in their turn opposed on the grounds that"

(1) It was a conduit for commercial interest seeking to export or create markets in the developing countries.[239] This view was largely based on the informal linkages the SF had with Bretton

Woods institutions which operated the well known system of "efficiency based conditionalities"[240] and the initial official disinclination of the Bretton Woods[241] institutions to integrate United Nations "multilateral development ideology", despite their specialised agency status, into their policy framework.[242] The SF was thus seen by many developing countries as flawed in its approach to their collective interests which would further weaken their negotiating and bargaining position in their negotiations with contributing developed countries.

(2) That the SF given its *"independent" legal nature* (GAR 1240 (XIII) paragraph iv (8) and links with private property holders, would grow into a "unilateral" decision making body, setting conditionalities for its assistance which could be restrictive of their sovereign rights to choose priorities.

(3) The proposed allocation of part of the resources of the SF to advanced or able developing countries, on a refundable basis would encourage discrimination among recipients contrary to the universality principle and the multilateral character of the fund and also negate the need to guarantee preferential treatment for developing countries.

Despite the initial opposition by developing countries, the SF became quickly operational. In practice, its decisions were supposed to made by consensus and in accordance with the principles of non-intervention or non-interference in matters within the domestic jurisdiction of the recipient State, the need for preservation of

voluntary contributions by "donor" States and "acceptance" of assistance by recipient States.[243] However, contributions by members were made *unconditionally*, that is, without limitation as to use by a specific agency or in a specific recipient country or for a specific project and no recipient country received special treatment with respect to its contribution. Negotiations about "use of funds" between contributing and recipient countries were prohibited under GAR 1240 (XIII) paragraph 50.

The **SF**'s assistance was rendered under three types of agreement.[244] *Firstly*, the Basic Agreement which regulated the legal relationship between the requesting State and the Fund. The Basic Agreement, whose provisions applied to all requests, laid down the conditions under which Fund Assistance would be provided and the basic conditions for project execution. *Secondly*, the **SF** sometimes allowed "reservations" to be made by the recipient government under "exchange of letters".[245] Reservations could be made in respect of project grants to third parties with regard to extension of exemptions and facilities granted to the **SF**. Such reservations could deal with issues of immunities for third party firms or private organisations and their personnel. However, **SF** assistance was, in practice, offered under more stringent terms than that under **EPTA**. This was due to the fact that approval of projects as recommended by the Fund's Managing Director required a two thirds majority, a process that developed contributing countries had the power to influence.[246] However, the principles of multilateralism were strictly adhered to, for example, project re-negotiation and departures from multilaterally agreed norms and objectives without over-riding reasons for such departure, were disallowed as contrary to the principles of equal participation and non discrimination.

Thirdly, the **SF** also signed Standard Agreements with Executing Agencies. Most of the characteristics of these agreements have been retained in similar agreements between the **UNDP** and the specialised agencies. Some of the characteristics of these agreements, such as lack of a dispute settlement mechanism are due to the fact that the Executing Agency, on signing the Standard Agreement, became covered by the Basic Assistance Agreement between the **SF** and the recipient government.

3.3 The UNDP

The continuation of the potentially conflicting special characteristics of the two programmes, that is, **EPTA** and **SF** was inherently problematic to the future balanced growth of the new programme.[247] However, the degree of success in achieving this balance is ascertainable from the fact that the Programme is the most successful international development policy formulation agency for fostering *technoeconomic* development in developing countries,[248] the world's most extensive single multilateral "market" for *technoeconomic* skills, services and currencies.[249]

The **UNDP** was created in 1965 under the United Nations General Assembly Resolution 2029(XX)[250] through the merger of **EPTA** and the **SF**. The merger aimed at, *inter alia*, to stream line operations of the two constituent parts, simplify organisational arrangements and procedures, facilitate over-all planning and needed co-ordination programmes of the United Nations and thus provide a framework which allowed evolutionary growth based on voluntary

financial contributions by member States as well as the retention of the special characteristics and features of the two constituent operations.[251]

In addition to the main principles set out in the introduction above, relating to the international technical cooperation activities of the Programme, **UNDP** in practice adheres to "multilateral" principles set forth in the United Nations Charter and subsequent treaties, international Resolutions, Decisions etc. These principles include, *neutrality, universality, voluntary and equal participation in international co-operative activity and non-conditionality*. Consequently, as we shall see, the programme has managed to ensure that even "autonomous" specialised agencies such as the World Bank (which is legally bound only to give "due consideration" to the inclusion on its agenda of items proposed by United Nations bodies), incorporates[252] developmental considerations into its development cooperation policy and activity.

The **UNDP** has achieved the latter goal by stressing, in principle and practice, that recipient government execution of programme supported projects should be the ultimate modality and that in co-ordinating programme and other multilateral financing institutions cross conditionality is to be avoided, that is, the programme's identity and principles must not be compromised and any joint activities with such institutions shall be of a complementary nature without any conditionalities on the assistance provided by the programme.[253] **UNDP** however does support the application of prudent management criteria by specialised agencies in relevant cases.[254]

The programme's influence has also helped it to encourage recipient governments to accept the need for modification of absolute sovereignty or territoriality based claims in accordance with the principle of interdependence which inter alia, requires promotion of international balanced *technoeconomic* cooperation as a pre-condition for preservation of international peace, independence and sovereignty of States, etc. Thus while national authorities, because of their direct knowledge of their society and its needs, are in principle taken to better placed than external agencies, institutions or organizations to determine "the best developmental interests" of the State in question, these countries contractually accept, among others, to:

(a) To ensure that in exercising their sovereign right to formulate their development goals and objectives, they also guarantee to their partners in international technical cooperation i.e. **UNDP**, specialised Executing Agencies and other relevant parties, that proper accountability[255] and transparency will be exercised in relation to their rights and obligations to the partners;

(b) That they address issues of global concern[256] such as human rights, under privileged groups, environmental issues etc. as a necessary condition for successful and continuous international technical cooperation.

In short the recipient government accepts the basic principle that the very essence and fundamental of all governments and laws and thus international technical cooperation is merely to ensure the safety of the people and the advancement of their rights and liberties.[257]

3.3.1 The Standard Basic Assistance Agreement as basis for Negotiated and Contractual International Technological Cooperation

The above mentioned principles are in-built into the Standard Basic Assistance Agreement (SBAA or the Standard Legal Text for non SBAA countries) which forms the major legal basis for **UNDP** cooperation activity with member recipient States. The SBAA provides a formal multilateral legal framework for negotiation and formulation of agreements and the continuous monitoring, evaluation and review of the agreed terms and conditions, which in turn ensures *transparency, accountability, negotiated and consensual decision making,* minimisation of disputes and thus better achievement of objectives.[258]

The Standard Basic Assistance Agreement (SBAA)[259] forms the legal basis for international technical cooperation activities between the **UNDP** and member States. It (SBAA) facilitates the programme's implementation of its various mandates, that is, on industrial training, natural resources development, stimulating scientific, technological and industrial development, facilitating regional and inter regional cooperation, fostering and co-ordinating technical cooperation among developing countries,[260] etc. The number of member States that have signed the agreement rose from seventeen (17) by the end of 1974 to one hundred and eight (108) by March 1990.[261] The SBAA, is therefore correctly defined as a recital of *a relationship between the whole and one of its parts, and instrument, which, by creating positive conditions and promoting fruitful* cooperation *between all members and the recipient State, guarantees continued international peaceful interdependence.*[262]

3.3.2 Substantive Provisions of the SBAA: a co-ordinated formal legal frame work for negotiation (offer - bargain - acceptance, performance and Follow-up) in Multilateral Technical Co-operation Agreements between UNDP and member States

The success of the SBAA, which replaced provisions formerly contained in four agreements and project documents, is due to a variety of factors. *Firstly,* the agreement, as a multilateral international agreement governed by international law, is fundamental, within the area of international technical co-operation, in encouraging member States to accept and adopt certain time tested legal models dealing with, among others, negotiation, performance of agreed terms and conditions under transparent, rules, procedures, standards and principles with the eventual purpose of creating a legal framework that facilitates:

(a) Orderly evolution and equitable change in the negotiation, implementation and follow up of the complicated international technical co-operation relationships;

(b) Safeguarding of rights of weaker parties;

(c) Proportionate and reasonable remuneration for suppliers of skills, services and other resources;

3.4 The Request and Offer Provisions in UNDP International Technical Co-operation Activity

Member States signatory to the SBAA become subject to "multilateral standards and principles" based on decisions and resolutions of the United Nations General Assembly and those of the **UNDP** Governing Council, in addition to the country programme. Consequently, the SBAA serves as a formal guiding framework for negotiation with individual Governments. The agreement

provides for individual States conditions or circumstances, providing opportunities for rejection or termination of assistance and possible "departures" from the basic agreement in cases where recipient countries show "over-riding circumstances for such departure";[263] while also providing, within a single instrument, a *balanced, structured and equitable framework* for **UNDP** operation in its relationship with co-operating States.

Article 1 of the SBAA provides for the application of the agreement to define the particulars of assistance and the respective responsibilities of the parties and the Executing Agency with regard to **UNDP** assistance and Project Documents and other instruments concluded by the parties. The SBAA provides the parties with advance knowledge of the legal parameters for **UNDP** assistance within the recipient country. The parameters are extremely useful not only in implementation but also in the rare cases when a member State or the programme may wish to suspend or terminate 'assistance'.[264] Article 2 provides that, in accordance with the principles of national sovereignty and freedom to choose or reject assistance, that **UNDP** assistance under the agreement is made only in response to requests submitted by the recipient Government and approved by the **UNDP**. The Article further provides that assistance shall be availed to the government, or such entity designated by the government, in accordance with the relevant and applicable resolutions and decisions of the competent **UNDP** organs and subject to the availability of funds to the **UNDP**. National Sovereignty is, preserved, further, under Article 3(1) which provides for overall responsibility for **UNDP** assisted projects to rest with the recipient Government.

3.4.1 Negotiation Modalities

The SBAA provides comprehensively for forms of assistance,[265] conditions of project execution,[266] privileges and immunities,[267] information concerning projects,[268] participation and contribution of Government in execution of projects,[268] use of assistance,[270] and relation to assistance from non - **UNDP** sources,[271] suspension or termination of assistance[272] settlement of disputes etc.[273] in short, it provides a substantive and procedural coordination table that the recipient State and the Programme use as a reference point in determining the direction of technical cooperation activity, its content and rights and obligations involved.

Adherents to the above mentioned argument about the Standard Agreement being a "contract d' adhesion" or "innominate contract" claim that while the SBAA may be a useful framework for consultation, evaluation, review and monitoring of undertakings, decision making between the organisation and the recipient countries have no effective power to decide the size of **UNDP** core resources,[274] rate of disbursement of those resources or their allocation to member States. The "unilateralism" argument is buttressed by citing "unilateralist features" of the SBAA such as the lack of specific stipulation(s) on non-interference by the **UNDP** in the internal affairs of the recipient country, non-definition of terms, lack of specification in Article XII that the venue for any arbitration proceeding would be the recipient country and the provisions for suspension or termination of assistance as under Article XI.

Such criticism, though of substantial validity in other related contexts,[275] ignores, as already noted, the fundamental nature and complexity of multilateral co-operation, that is, its being founded on consent, effective participation by the recipient State in multilateral decision making, a process which is by definition and nature, based on consensus. Since its inception, the SBAA has undergone negotiated "evolutionary" change. Such change has covered the whole chain of co-operation from preparation of country programmes to post contract or follow up arrangements. Consequently, the negotiating framework of the SBAA has been gradually modified to meet the special requests and needs of recipient States. Thus some provisions originally included under the standard agreement, such as those relating to rights to intellectual property generated during the performance of projects, have been dropped or modified.[276] Recipient countries have also on the other hand dropped some initial objections, such as those relating to the extension of "certain privileges and immunities" to cover, resident representatives and consultants.[277]

Following one of the recommendations of the Jackson Report,[278] country programmes for technical and pre - investment assistance emerge from continuous formal "dialogue" between the Government authorities concerned with the administering or studying of economic and social development conditions of the recipient country and the **UNDP** Resident Representative supported by **UNDP** headquarters in communication with other multilateral and bilateral programmes, especially the World Bank.

The **UNDP** view on the country programme is contained in the Resident Representative Advisory Note which is based on the national development plan or

the governments known socio-economic priorities, especially those development objectives where technical cooperation[279] can play a critical role. The note also contains the relevant information derived from the national development plan and other relevant documentation, for example, on sectoral or multilateral studies undertaken by the Government, multilateral or bilateral programmes, or from **UNDP** funded programmes under the authority of the Administrator. it also includes Programme past experience and lessons, initial assessment of resource availability and relevant information from the outcome of any World Bank consultative group meetings and **UNDP** assisted "round tables", if any.

During all negotiations, the basic purpose of **UNDP** technical assistance is to help the recipient State to achieve "self-reliance" by helping it to develop its technological capacity to meet, inter alia, production or output targets in the relevant sectors, especially through development and enhancement of its human resources[280] or skills, etc. To fully execute its role, the **UNDP** prepares thoroughly for its "advisory" role through, inter alia, the Resident Representative holding consultations with the Executing Agencies on the proposed content of the country programme, and if prior permission is given by the recipient country as required, holding consultations with multilateral financing institutions, bilateral agencies and representatives of non Governmental organisations (NGO's).[281] Negotiation of the recipient country's share of **UNDP** core resources has proved unnecessary in **UNDP** practice for various reasons, for example;

(a) The **UNDP** is a multilateral body with no narrow predominant or specific national interests (i.e. it promotes collective international goals) to determine the disbursement of Programme funds;

(ii) Available **UNDP** Funds are voluntarily and unconditionally contributed by member States and are not fixed or varied by the Programme;

(iii) The **UNDP** is legally *bound or committed to* assist its member States, especially the least developed, to mobilise additional resources beyond the IPF,[282] on concessional terms, and to meet any special needs;

(iv) Individual State negotiation of country allocations could encourage use of conditionalities or result in "discriminatory treatment" in favour of States with greater negotiating power or "assumed need", contrary to the principles of universality and equal participation. (Under **UNDP** practice, special needs are submitted to the Programme review Committee which recommends a position to be taken under the Administrators note[283] to the Governing Council.)

3.5 Implementation of Agreements - The Principles and Procedures to guarantee Transparency and Accountability including the Review and Evaluation mechanisms

The **UNDP** has evolved, in partnership with recipient Governments and Executing Agencies, a framework to ensure certainty in terms when implementing **UNDP** sponsored and related international technical co-operation activity. Member countries which are signatory to the SBAA automatically become subject to the procedures, non - SBAA countries have to sign the mandatory project document annex which provides for, the same procedures, subject to the organisation, terms of reference and timing being decided after consultation between the parties.

3.5.1 Transparency [284]

After a technical cooperation programme agreement between the Programme and the recipient, implementation is under terms and conditions, including the juridical provisions of the recipient State, to which all parties have free and public access, including all private party contractors and non State organisations involved. Transparency is essential especially when considering normally sensitive issues such as the role of non State and private parties in *technoeconomic* development efforts in the recipient State. Since the 1970 Consensus, the **UNDP** has encouraged[285] non State party participation in international technical cooperation to, inter alia, transfer skills recipient States[286] (1970 Consensus).

Transparency is ensured by extending law to the entire process of technical cooperation i.e. from pre-investment studies, negotiation, performance, to follow up and dispute settlement. Such extension is based on the Programmes comprehensive experience about the nature of the development process, especially due to its legal links to the numerous development agencies. The **UNDP** has evolved in partnership with recipient States and Executing Agencies, standards, rules, principles and procedures which are aimed at making all parties, including non State and private parties,[287] an integral part of the programming process and the formulation, implementation and evaluation of projects, subject to those private parties effective participation in the transfer of systematic knowledge and skills (such as training recipient country nationals to execute feasibility studies, plant designs, civil works, plant erection, quality control, plant management, marketing services, management training etc.) to recipient State nationals. The **UNDP**

and relevant Executing Agency instruct and control all the activities of the non State or private party participants.

The requirement for transparency in recipient countries juridical and administrative regimes has sometimes been criticised as a disguised conditionality, for example, to *liberalise.*[288] Encouragement of, *inter alia,* "liberalisation" of recipient country transfer of technology or foreign investment legal regimes is not a conditionality unless such a requirement is coercive, creates or perpetuates an unbalanced relationships between the Programme and the recipient. Legitimate transparency requirements, in accordance with international law, aim at ensuring, *inter alia*:

(a) That *technoeconomic* skills provided by non nationals under the Programme i.e. as technological skills or other investment are supplied under balanced terms[289] and conditions;

(b) Suppliers of skills under Programme sponsorship do not abuse their powers, for example, by creating technological or skill "islands" in the recipient State;

(c) That recipient countries provide legitimate reasons for rejection of or exclusion of parties, especially non national private parties, from specific technical co-operation projects. Where no reasonable grounds are rendered in cases of such exclusion, the **UNDP** may then legitimately withhold its financial contribution to a project, especially if such private party exclusion is deemed by the programme to be vital to the success of the project.[290]

Due to the importance that the **UNDP** attaches to transparency of measures applied to international technical co-operation activity, various measures are agreed

between the programme and its member States to ensure such transparency. The measures include:

3.5.1.1 The principle of equitable geographical distribution

In the selection of individual experts, private institutions or firms consistent with maximum effectiveness of supplied technical skills, know-how etc. The **UNDP** and recipient States ensure that firms of developing countries as well as national expertise, training capacity, consulting firms and equipment in **UNDP** funded projects is fully utilised whenever possible. The programme thus encourages recipient States to assess their own national private enterprise potential through for instance the national technical cooperation assessment programmes (Natcaps), transfer of knowledge through expatriate nationals (TOKTEN), etc.[291]

3.5.1.2 The Model standard letter of agreement [292]

This agreement contains terms and modalities applied in cases of recipient government execution of **UNDP** sponsored projects. It largely applies to non-governmental organisations or local "agencies" and organisations that are not covered by the SBAA or Specialised Agency agreements. Under the letter of agreement, the Government consents to provision of services by the a co-operating agency, with appropriate provisions for "close consultations" on all aspects of ht services to be rendered by the co-operating agency.[293] The Government, through its designated project co-ordinator, retains overall responsibility for the implementation of **UNDP** assistance to the project. The agency provides project co-ordinators with "appropriate technical guidance and administrative support" and

they remain accountable to the co-operating agency for the manner in which they discharge their functions. The project co-ordinators have an obligation to co-operate closely with recipient government staff and assist in project implementation in accordance with the overall directives laid down by the Government in consultation with the co-operating agency.[294]

Upon acceptance of the letter of agreement and pursuant to the project budget of the project document and the work plan, the recipient government agrees that:

(1) The co-operating agencies, subject to the conditions set out in the letter of agreement, may request advances of funds directly from **UNDP**;

(2) The co-operating agency must submit reports relating to the project as may reasonably be required by the project co-ordinator.

(3) The co-operating agency will enjoy the privileges, immunities and facilities accorded to executing agencies and their personnel under the agreement concerning assistance concluded by the Government and the **UNDP**.[295] This provision interprets as providing functional privileges and immunities only.

Amendments to the arrangements under the letter are made by mutual agreement and disputes are settled by consultation between the project co-ordinator and the co-operating agency project personnel, with the Government project co-ordinator decisions prevailing until agreement is reached.[296]

3.5.1.3 Transparency and promotion of Accountability and Stability of implementation of agreements

To ensure that all parties meet their obligations and especially that the supplier of technical skills and or expertise effectively assists the recipient to acquire technological capacity; a proper accountability system is used. Proper accountability involves use of an objective monitoring, review, evaluation and reporting procedure to ensure maximum contractual "transparency" and accountability by all parties, facilitated by use of the extensive experience and data banks of the United Nations System, which enable, among others, rating of technological supplier firms according to past performance.

3.5.1.4 Country Programming

As Stated above, the United Nations development system operates on the fundamental principles of interdependence and equal participation by all, that is, promotion of collective international goals, reciprocal exchange, mutual assistance and co-operation. These principles are promoted and applied largely through the country programming process, especially to promote mutual co-operation among recipient States.

Country programmes achieve or reflect these goals and principles with a clarity that depends on the comprehensiveness of the programme (often set by the *technoeconomic* level of "advancement of the developing country in question). The programme encourages advanced countries to raise the level of regional or South - South technical co-operation (i.e. co-operation among developing countries) vis-a-vis national priorities for technical co-operation. For example, the Fourth Country Programme for Brazil,[297] sets out in paragraph 12 that "not all national

priorities included in the development plan need technical co-operation from concessionaire sources, either because Brazil already had the technical and managerial competence to solve its own problems, or because external technical inputs could be acquired through commercial sources". The country programme then sets out the criteria, determined by the Brazilian Planning Secretariat and **UNDP**, for Brazilian participation in multilateral technical co-operation.

These include:

(i) Assisting Brazilian institutions to gain access to external knowledge, such as technology, operational experience and policy objectives, building upon the objectivity, management capabilities and sectoral experience of the United Nations System;

(ii) Acquire a real transfer and national absorption of knowledge and know-how in priority areas though adequate projects and foster independent innovation and creativity;

(iii) Promotion of projects with a high potential for technical co-operation among developing countries (TCDC).[298]

3.5.1.5 Monitoring

Among the mechanisms for promotion of transparency and accountability adopted under the Programme is the monitoring process. Monitoring is a supervision process meant to ensure continuous oversight of the implementation of a country programme[299] and to indicate whether that programme is progressing towards its stated objectives, identify necessary changes in programme

implementation, if any and suggest "corrective measures". Monitoring o the country programme is a joint responsibility of the recipient Government and **UNDP** and is executed by the project management, that is, the leaders of the national staff and international staff, whether the project is Government, Agency or **UNDP** executed.[300]

The monitoring process is based on the principle of "complimentarity" of action between the representatives of the recipient Government, **UNDP** and relevant Executing Agencies and other "collateral" parties, especially in reference to the substance, effectiveness of management and financial soundness of the country programme. Monitoring facilities measurement of progress in "project" activities and production of outputs against established indicators of progress,[301] identification and assessment of factors affecting the progress of the project's principle and collateral activities and also identify necessary actions and the party to undertake them and the "time frame" for such action.[302] Within this framework, the parties can assess the extent to which original programme designs are implemented, whether according to sector or technical cooperation objectives, ensure accountability for any unplanned activity undertaken by a party, the type of "assistance" required to achieve programme objectives such as transfer of special skills and technology, determine the mode the levels of cooperation such as Government and Agency execution, use of direct support for projects or use of long or short-term foreign expertise, etc.[303]

Thus while responsibility for any efforts to achieve development objective(s) rests with the government, the **UNDP**, through monitoring, assesses collectively all technical cooperation projects it assists and which are directed to the

same, similar or closely related objectives, thus forming an information and experience pool which member States can call upon in later projects.

3.5.1.6 Evaluation

We have just noted the role of project monitoring in determining inter alia, the relevance, effectiveness and development impact of international technical cooperation activity in the recipient State. The cooperation table in **UNDP** practice follows monitoring with the process known as evaluation. The major objective of Evaluation is given as a "learning and action - oriented management tool and a process for improving current implementation and future planning and decision making".[304] The value of such a system for the information deficient developing especially the least developed, is apparent.

Using this process, the parties decide, inter alia, initiatives and/or corrective measures to improve the effectiveness of on going projects, whether to continue with, revise or extend a project especially in light of its impact and relevance to the programme of which it is a part, formulation of responses to substantive concerns of public policy makers, programme managers and other interested parties, etc.[305] Evaluation is implemented selectively, being restricted to the minimum essential for the improvement or follow-up of the projects concerned, for the needs of Governments and for the improvement of the Programme. The Evaluation process consists of three phases, that is:

(1) On going evaluation which is aimed at improvement of performance on going projects;

(2) Terminal evaluation which is aimed at improvement of on going project as well as providing the basis for future action;

(3) Ex-post project evaluation, is carried out a minimum of two years after project completion. It is used t convey to decision makers, normally in the recipient country, the lessons learned from the project as an aid to the identification and implementation of future projects and programmes. It also crucial to **UNDP** "information and experience" pool for application elsewhere among its member States.[306]

From this process of evaluation also emerges the Project Performance Evaluation Report (PPER) which is prepared by the national project co-ordinator and/or senior officer of the United Nations Executing Agency, for the Tripartite Review.

3.5.2 The Tripartite Review Process

The most important mechanism for ensuring that the parties involved in the implementation of **UNDP** sponsored projects are in "continuous" consultation is the Tripartite Review meeting. The process is not an alternative to the Monitoring and Evaluation procedures but a means of assisting parties to consult on targets, project objectives, contractual purpose and function of each party and ensure that the recipient Government undertakes "enabling" (transparent) action for project execution such as "passing necessary legislation", granting "privileges", guaranteeing diplomatic protection, issuing import licences, etc.

The Tripartite Review[307] is a meeting of the parties directly involved in the implementation of a project. It is a *formal, planned and periodic mechanism* for taking joint decisions about the design and implementation of projects. The review determines implementation of decisions and party responsibility or accountability for particular decisions or acts.[308] The Tripartite Review meetings are, normally, annual and are mandatory only for projects where the total **UNDP** budget equals or exceeds $400,000 (including cost sharing), otherwise the Tripartite Review is held when requested by any of the parties or if justified.[309]

The first Tripartite Review occurs within the first twelve months of full implementation. The Tripartite Reviews are initiated by the resident representatives in consultation with the Government and project management and are project-specific, that is, the "agenda" that is set for the review (by the Resident Representative in consultation with the Government) reflects the views and intentions of the Executing Agency and, as appropriate, those of the recipient Government co-ordinating authority and those of the **UNDP** based on the headquarters project performance evaluation report (PPER)[310] prepared by a senior project officer of the United Nation's Executing Agency and national project co-ordinator.

All parties immediately concerned with the project are represented at the review, which is presided over by the appropriate Government official. The review normally covers the issues of follow-up, project concept and design, progress, operational issues, work plan, decisions and recommendations and need for evaluation.[311] After the meeting, a Tripartite Review report is prepared by the Resident Representative in consultation with the parties concerned.

Terminal review is prepared at the end of each country programme for purposes of assessing the level of achievement of targets and set goals, including whether the target groups and intended beneficiaries have been covered by the project. The same approach taken in reviews of regional, inter country and global projects. Other main objectives of the parties in carrying out Tripartite Reviews are:

(a) The building of an "information base for use in future projects";

(b) Ensuring proper coordination of "sensitive" issues in project implementation including "structural adjustment or other policy reforms" which recipient countries may be required to undertake as a result of **UNDP** related specialised agency requirements such as World Bank or IMF recommendations;[312]

(c) Achievement of set goals for the satisfaction of target group needs and special beneficiaries;

(d) To enable the parties to reach agreement on the coordination of assistance from different sources, for example, joint programming by various United Nations agencies or organisation as well as integration of contributions from bilateral sources, such as funds acquired through "round table conferences, trust funds, etc.

3.6 UNDP Technical Co-operation and the New International Economic Order - Interdependence Postponed?

3.6.1 UNDP and issues of regional technical co-operation among developing countries (TCDC) or *mutual self-help*, The inter - country programme -

The **UNDP**, in accordance with its constitution and subsequent mandates,[313] for example, that under the Buenos Plan of Action for promotion and implementation of technical co-operation among developing countries, co-ordinates most regional and inter - country projects in accordance with the objectives of assisting the Governments of developing countries to achieve through the United Nations Development System, mutual or collective goals promotional of shared use of technical resources, skills and capacities between and among them. Thus the programme organises and supports inter - country programmes, funded through special inter country programme funds (IPF's) allocated by the Governing Council. Projects funded under this head are primarily aimed at promoting use of shared resources and institutions and achievement of shared goals. They are prepared by **UNDP** regional bureaux in consultation with the relevant recipient Governments, specialised Executing Agencies,[314] regional commissions, resident representatives and other interested parties.

The **UNDP** special Unit for TCDC formulates and prepares and finalises projects in accordance with guide-lines established by the Governing Council. These guide-lines are in accordance with recommendations made by the inter Governmental reviews of TCDC activity within the United Nation's system, reviews that are carried out by a high level committee for TCDC of all member

States of **UNDP**.[315] This ensures that TCDC activity is reviewed constantly as it evolves to ensure that it meets the objective of furthering the national and collective self-reliance of developing countries[316] and enhances their innovative capacity to solve their development problems without however turning TCDC activity into an end itself or into a substitute for multilateral interdependent cooperation, (including international technical cooperation) involving developed countries.[317]

3.6.2 UNDP and Technology as a Common Heritage of Mankind Principle

The **UNDP**, especially due to its network of formal legal arrangements with specialised agencies, is central to the eventual realisation of the goals of the New International Economic Order by developing countries. With reference to technology transfer, the programme facilitates increased access to internationally available technology for all developing countries. In pursuance of this objective the programme initially presumed that benefits of discoveries made during **UNDP** assisted projects, if made solely by **UNDP** financed experts, should be available to all developing countries, that is, all arrangements under which the ownership of a discovery of discoveries, technical documentation, computations or data of a particularly complex nature, design work of a specialised nature etc., would automatically pass into the public domain[318] at the termination of the project. However, as after due consultation and negotiation with member States, this position was modified to take into account recipient State's national interests in regard to specific findings. Under the SBAA, Article IV (i) the recipient Government "shall furnish" the **UNDP**, upon request, any relevant reports, maps,

accounts, records, statements, documents and other information relating to any **UNDP** assisted projects, its execution or continued feasibility and soundness, or concerning the compliance by the Government with its responsibilities".[319] However, documentary outputs or other information outputs from projects are available to the recipient Government, Executing Agency, **UNDP** and other organisations within the United Nation's system on a restricted basis. The restricted status of the information may be maintained by the Government in cases of information of a confidential nature or if it felt its national security would be affected by "de restriction".[320]

However, because projects are performed within the developing countries (which means that the information pool is largely from these countries) the **UNDP** has only encouraged recipient countries to agree to minimum secrecy and restriction arrangements and not full disclosure. The Programme places special emphasis on minimum restriction of technical and/or scientific information gathered during implementation of **UNDP** assisted projects, especially that which is of special interest to other public and private organisations and institutions or information emerging through substantive contributions by the **UNDP**. In such cases, the programme encourages, in conformity with the relevant agreement(s) governing the technical co-operation, the de-restriction of documentary outputs for utilisation by all interested parties. Under Article IV (5) of the SBAA, the parties agree to "consult each other regarding the publication, as appropriate, of any information relating to any **UNDP** assisted project".

UNDP practice provides for "automatic lapse" of restriction. Automatic de-restriction occurs six months after submission of a document to the relevant

parties unless the government submits a written request for the continuation of the restriction. Further, when the Resident Representative "automatically" draws the recipient government's attention to the restriction provisions, that government may waive the restriction[321] requirements as appropriate. Where a recipient government stipulates for "documentary" secrecy but fails, after discussion or other necessary measure with the Resident Representative to make a written representation to justify the continuation of the restriction, the resident representative applies the automatic de-restriction clause and on application of such clause, promptly informs the **UNDP** headquarters "about the de-restriction".[322]

3.6.3 The UNDP and Special or Preferential Treatment for The technologically Least Developed Countries

Before the **UNDP**, some limited effort was made to accord special treatment to newly independent and poor developing countries. Thus under the 1961 and 1962 regular budget, a sum of United States $5 million was set aside to be used mainly to provide assistance to new States. However, such "special treatment" was, as a rule, regarded more as "discriminatory" rather than as fulfilling the requirements of re-distributive or substantive justice. The major principle observed by the **UNDP** is equal participation by all member States, regardless of their level of development: technological, political, socio - economic or cultural.

However, the need to remove material inequality between members is now recognised (for example, Lima Declaration and Plan of Action on Industrial Development and Co-operation)[323] and preferential treatment is an accepted international legal means for reducing such material inequalities. The **UNDP**

therefore now jointly operates a variety of instruments, measures and programmes with other intergovernmental bodes. The measures or instruments include co-financing, trust funds, management support services, round tables, special funds etc. However, all contributions to these funds and instruments must be consistent with the principles of universality or multilateralism[324] and non-conditionality. Thus programme preferential treatment for developing countries, especially the least developed among them, is given,[325] without prejudicing the universality of the programme and its relevance to the needs of all developing countries. This "preferential approach"[326] undertaken under various measures such as the Special Measures Fund for the least developed countries (SMF), Special Industrial Services Programmes[327] (SIS) - the more advanced developing countries[328] do not receive allocations from this fund-, Round Table conferences, etc.[329]

The special measures and mechanisms availed to the least developed countries facilitate their faster acquisition of technological capacity. Thus for instance, SIS resources are available only in relation to development needs of the relevant country and may be used, inter alia, for:

(1) Acquisition of high - level experts to advise on "urgent" specific questions related to the preparation and implementation of industrial projects[330] and new manufacturing projects at various stages of development, especially those involving complex manufacturing projects and techniques;

(2) Acquisition of services of specialised institutions or consulting engineering organisations which are not normally available in the less advanced developing countries;

(3) To acquire services of nationals with specialised knowledge etc.

However, they can also be available for acquisition of equipment,[331] to meet effects of natural disasters and consequent rehabilitation or reconstruction efforts.[332]

3.6.4 UNDP and advanced developing countries, the issue of Graduation

From its inception, the **UNDP** has faced the problem of security of resources relative to the demand for its services and assistance. As a consequence, some member States have often raised the issue of the "graduation" of the more advanced countries, that is, stoppage of Programme resource allocation to the countries in question. However, despite the theoretical soundless of "graduating" countries that have reached a certain stage of socio-economic and cultural development, the usual problem of legal as well as socio-economic criteria for such graduation always arises.[333]

Mandatory graduation or cut off under the programme has been rejected by both the Governing Council and developing member States as contrary to the universality principle, voluntary-ness and equal participation principles on which the programme operates.[334] The programme however has a mandate for "voluntary or *ad hoc* graduation" of some member States from part of its technical cooperation programme. Under GAR 1240 (XIIO paragraph 56(b), passed under the EPTA/UNSF period but carried forward under **UNDP** - the Governing Council

"shall be authorised to consider allocating a part of the resources of the Special Fund for assistance on a refundable basis at the request of Governments for projects within the terms of reference for the Fund", that is, technical cooperation can be provided on a cost reimbursable basis to those countries which can afford it. The objective of the resolution was to preserve United System resources and re fundability was to be established, like all other elements of country programmes and projects, in complete agreement with the recipient Government. By consensus, recommendations to the relevant Governing Council for projects under this head, on a fully or partially reimbursable basis are allowed only for very unusual projects.[335]

However with the emergence of some highly advanced developing countries, the programme has increasingly recommended the voluntary adoption of "net contributor" status. Developing countries in a position to do so are required to make every effort to reach net contributor status, either by increasing their voluntary contributions or y giving up their IPFs, partially or wholly.[336]

3.6.5 UNDP and the Issue of Human rights protection in Recipient Countries - conditionality?

The **UNDP** has specific mandates that include combating hunger, promotion of scientific and technological development,[337] the right to education, the right to enjoy the benefits of scientific progress and take part in cultural life, the right to enjoy the benefits of scientific progress and take part in cultural life, the right to participate and other rights enumerated in the International Covenant on Economic, Social and Cultural Rights,[338] the Declaration on the Right to Development,[339] etc. However, unlike some of the United nations Specialised

Agencies like FAO and UNESCO,[340] **UNDP** has no specific mandate to promote member States' observance of human rights.

Member States have contended that the withdrawing or suspension of Programme assistance because of alleged "human rights" violations would constitute a violation of the non - intervention principle and would be interpreted as *discriminatory or in bad faith by affected member States.* For example, at the 19th session (1975) of the Governing Council,[341] several member States voiced their regret that the Administrator should continue to approve projects for the Republic of Vietnam, the Republics of Korea and Chile, after having stated that the giving of assistance to the regimes in power in those countries was "*contrary to the purposes and tasks of* **UNDP**".[342] A member of the Council replied that regarding technical assistance to his country, General Assembly Resolution 3201 (S-VI) paragraph (4) recognised the right of every country to adopt the economic and social system that it deemed the most appropriate for its development without being subjected to discrimination of any kind as a result.

Further, States are not bound by legal obligations in respect of human rights unless they have voluntarily ratified international conventions or covenants on such matters and the United Nations system was not intended to interfere with matters essentially within the domestic jurisdiction of States unless such matters posed a threat to international peace or a breach thereof or constituted an act of aggression[343] and under customary international law, no rule was clearer than that a State's treatment of its own nationals was a matter exclusively within the domestic jurisdiction of that State.[344] It is contended that selective promotion of rights violates the essential indivisibility of all rights.

The foregoing arguments, while carrying "traditional" validity, are largely founded on premises which seek to confine international relations within a "static legal framework", a framework unresponsive to the increased number of "global issues", that is, interdependence. Thus though **UNDP** international technical cooperation activity is basically consensual, and is executed in partnership with the recipient State with provision for the suspension or termination of cooperation, to react further to the "new dimensions"[345] of interdependence, the **UNDP** has taken a number of measures, for example:

(a) Encouraging recipient States to take primary responsibility for the effective protection of the rights of national and non - nationals within their jurisdiction;

(b) Encouraging measures such as poverty alleviation,[346] the integration of women into the development process;

(c) *Promoting the right to access to scientific research and creative activity for all groups, the right to education, the right to enjoy the benefits of one's own research and creative activity* etc.;

(d) Non reservation of allocations to countries which participate in "aggressive wars" or which perpetrate "gross human rights violations",[347] unless the authorisation of allocation to the State in question cannot be construed as encouraging the continuation of the violation in question,[348] that is, **UNDP** technical cooperation must promote or give effect to *technoeconomic*, social and cultural[349] development.

These measures help to promote, *inter alia*, collective international goals such as human skills development and institutional development in developing countries, thus directly and indirectly promoting the acquisition of technological capacity[350] within LDC States.

3.6.6 UNDP and the problem of donor "conditionality", issues of developed member State control

From its inception, the **UNDP** has always faced the serious problem of the insufficiency of its resources[351] relative to the magnitude of its mandated tasks, and the lack of predictability, continuity or guarantees for future resources.[352] Programme funds are derived from a number of sources. The most important or "core resources" are raised from the voluntary contributions of developed member States or advanced developing countries that have achieved net contributor status. Another source is the cost sharing mechanism between the recipient and "donor" Governments, trust funds and earnings from management services for bilateral and multilateral funding sources.[353]

The system of voluntary contributions was preferred by developed States[354] as the best method for determining the amount of "aid" resources they could allocate to Programme and other United Nations System bodies. It is stated that the decision to offer aid is one that is essentially within the domestic jurisdiction and discretion of the "donor" State[355] and not an obligation *erga omnes*,[356] though donor states may not place conditions on the use of their contributions (**UNDP** financial regulation 4.4). However, developed countries claims have to be interpreted in accordance to the principle of interdependence. For example, *'overall*

reciprocal benefit is achieved by donating states by way of sub contracts, capital equipment purchase order, etc., awarded to their nationals and developed countries concur in many resolutions to ensure continuous assistance, including technical assistance, to developing countries. to increase contributions, in conformity with continued negotiated cooperation between **UNDP**,[357] donor and recipient states, it may become essential to link effective voluntary contribution levels to **UNDP** contact awards.[358]

3.7 Suspension or Termination of UNDP Assistance and the Dispute Settlement Mechanism

We saw above that **UNDP** cooperation and assistance is not unilaterally terminated or suspended, even in cases where the continuation of such cooperation is "contrary to the purposes and tasks of **UNDP**.[359] However, provisions for suspension or termination of assistance are contained under Article XI of the SBAA The provisions of Article XI are invoked only after the "fullest consultation" between **UNDP** and the relevant Government.[360] Suspension or termination of assistance is a measure of last resort and can only occur where the parties cannot agree upon "changes" to a project or a country programme. The cause of dispute should be due to unforeseeable changes that fundamentally alter the equilibrium of the agreement or changes that are likely, from the very outset or over the course of time of a project or country programme, to cause major delays or prevent achievement of project or programme, to cause major delays or prevent achievement of the **UNDP** may, under Article XI(i), by written notice to the Government and the Executing Agency concerned, suspend its assistance to any project if in the judgment of **UNDP** and circumstance arises The **UNDP** Governing Council considers and approves all projects and programmes and the allocation of funds, provides general policy guidance for the organisation and decisions are made by majority vote. Member representation on the Council is based on the need for preservation of equitable and balanced representation of the economically more developed countries on the one hand and developing countries, suitably represented on a regional (geographical) basis, on the other.

which interferes with successful completion of the project or the accomplishment of its purposes and may by subsequent notice indicate conditions for resumption of assistance. Suspension continues until the recipient government accepts to eliminate the dispute causes and the **UNDP** gives written notice of its preparedness to resume its assistance. This requirement is not a conditionality but arises due to the fact that the vast majority of **UNDP** projects fall into the institution building category[361] and consequently, require maximum government participation and co-operation as a prerequisite for the successful continuation of **UNDP** activity within the recipient State.

Programme assistance may thus only be suspended or terminated if the recipient Government creates an atmosphere where the continuation of co-operative or partnership activity is "excessively" prejudicial to either the achievement of the desired technical co-operation and other goals and objectives or poses a continuing risk to **UNDP** activity and Executing Agency project personnel. The **UNDP** terminates its assistance by written notice if the situation in dispute continues for a period of fourteen days (14) days.[362]

3.8 Institutional Mechanisms for implementing Programme Technical Co-operation activity - The UNDP - Governing Council

Under paragraph 4 of the resolution for the consolidation of the **SF** and **EPTA** into a single programme, GAR 2029 (XX) of 1965, a single inter governmental committee or Governing Council of thirty seven members was established to assume the functions of **EPTA** Technical Assistance Board and **SF** Consultative Board.

The Council is supposed to make policy to implement the various mandates inherited by the **UNDP**[363], as set out above. With regard to international technical cooperation, the Council has since the mid 1970's formulated policy to promote self-reliance opting countries have been helped to increase the availability of their local managerial, technical, administrative and research capabilities, for example, through the appointment of qualified developing country nationals as international project managers in their own states, enhancing government formulation and implementation of projects vis-a'-vis Agency or **UNDP** directly executed projects, increasing the use of the "structural approach" which aims at identifying and removing structural obstacles to development etc.[364] The programme has also focused on "human beings" as the ultimate objective of development as part of the "new dimensions" approach.

In 1970, the governing Council recommended, and the General Assembly endorsed the recommendation in the same year, that Country Programmes[365] should be drawn to coincide with the recipient country's own development plan. This recommendation, which was based on, inter alia, the Jackson Report[366] was

meant to emphasise that the **UNDP** country programming process is a government led exercise leading to the integration of **UNDP** technical co-operation activities into the development plans and priorities of the recipient country. The approach therefore simultaneously stresses the primary responsibility of recipient governments for their economic, social and cultural development and the importance of the complimentary role of international co-operation.[367] Recipient countries have accepted the concept of country programming as very positive[368] and the **UNDP** has emphasised the lack of unilateralism in the country programme process by ensuring that the **UNDP** Advisory Note (formerly the **UNDP** position paper) is prepared with the intention of initiating and focusing **UNDP** and recipient Government discussion on the preparation of the country programme, reflects the view of the **UNDP** based on the national development plan or the governments known economic and social priorities, especially those development objectives where technical co-operation could play a critical or fundamental role.

3.9 UNDP and the Executing Agencies [369]

The **UNDP** though acting as the central funding body for the United Nations Technical Assistance activities, relies on specialised agencies and other organisations for the execution of its projects. Initially problems arose because several of the specialised agencies such as ILO, the World Bank and IMF have constitutional powers that invest their organs with the competence to make decisions that are legally binding on their members and in some cases, the agency has power to suspend the membership of any member State that fails to

fulfill any of its obligations.[370] Further, as we have pointed out, the Bretton Woods institutions, in their articles of agreement or their specialised agency agreements with the United Nations, have affirmed and reiterated their autonomy. In the case of the Bank's loans, the Bank's action is "a matter to be determined by the independent exercise of the Bank's own judgment. The **UNDP** ensures that implementing Agencies do not upset the "balanced table of rights and obligations" established between the programme and its member states.

This "autonomous or semi-autonomous" position of specialised agencies means that without specific agreement, **UNDP** would not be able to influence the actual decision making by the executing agencies as the agencies would follow their own separate,[371] and established procedures for evaluating development performance, selection, appraisal and supervision of projects, monitoring, evaluation, reporting and follow-up on projects etc., or create cross conditionality. To overcome these and related problems, it was suggested, mainly by developed countries, that closer relations be established between the **UNDP** and specialised agencies such as the IBRD.[372] The **UNDP** - World Bank closer cooperation,[373] in particular, though enabling the **UNDP** to take advantage of the Bank's research capabilities, sectoral surveys and technical assistance,[374] was objected to strongly by developing countries, largely on the grounds of the Bank's weighted voting and limited membership, its sourcing of funds and the conditionality of its lending activities.

The Programme solution to the problem of "autonomy" of specialised agencies and the likelihood of cross-conditionality has been that:

(i) There must be preservation of the identity of the programme and the principles that govern its actions, that is, that any co-ordination between **UNDP** and "multilateral financing institutions" or agencies be of a complimentary nature must not entail any conditionalities on the assistance provided by **UNDP**;[375]

(ii) Formal agreement between the programme and the Agencies - **UNDP** enters into agreements with each specialised agency or related agency as it becomes an executing agency for technical co-operation activities of the **UNDP**. The agreement, concluded between the Administrator of **UNDP** and the executive head of the relevant agency, bestows an "independent contractor" status on the agency vis-à-vis **UNDP** and provides for agency accountability to **UNDP**.[376] Further, the respective roles and obligations of the two organisations are defined and rules set out regarding suspension or termination of assistance to a recipient Government. Provision is made for the obligations of the executing agency with respect to waiving the immunities of operational experts or consulting firms it has retained.[377] When the agreement between the **UNDP** and the specialised agency is concluded, the agency becomes entitled to "cover" under the SBAA;

(iii) Special arrangements are executed whenever the relationship between the programme and the Agencies is new, not clear or is to complex. Among such arrangements are the "special interest" or the co-operative arrangements with various development finance institutions, including the World Bank, European Community, International Fund for Agricultural Development and regional development Banks. Co-operative arrangements are used to provide investment and/or technical assistance financing as a follow-up to **UNDP**

assisted project with investment potential,[378] provide information on projects, especially draft project documents which are of significance to them in terms f investment follow-up etc.

(iv) Agencies must declare special interest in specific projects. Thus for instance, the programme has arrangements with the Inter-American Development Bank (IDB) and EEC, under which direct consultations between the **UNDP** field office staff and their counterparts in the field offices of these institutions are undertaken. This process ensures, inter alia, complimentarity of country programming and collaboration on the identification and use of **UNDP** assisted pre-investment projects by these institutions. The agreement with IDB also calls for consultations on projects and programmes at the IDB headquarters prior to the monitoring of IDB country programming missions;[379]

3.10 UNDP - UNIDO, a model arrangement for developing the technological capacity of developing countries?

Among the many specialised Agencies whose role includes transfer of technology to developing countries, the United Nations Industrial Development Organisation (UNIDO) may be said to possess the most central and direct role UNIDO was constituted to "intensify, concentrate and expedite" United Nations efforts to assist developing countries to industrialise, for example, as provided for under GAR 1940 (XVIII) of December 1963. Among its other mandates is the Lima Declaration[380] which provided a special focus and an industrial dimension to Resolutions 3201 (S-VI) and 3202(S-VI) of May 1974 adopted at the sixth Special Session of ht General Assembly on the Declaration and Programme

Lima Declaration charged UNIDO with, *inter alia*, the establishment of a system of consultations between developed and developing countries to facilitate the establishment of the New International Economic Order and the achievement of a share 27% of total world production by developing countries by the year 2000, through, *inter alia*, industrial restructuring and re deployment. The Declaration was voted against by the United States while seven countries abstained[381] and full implementation of the mandate through the **UNDP** is opposed by some members as *ultra vires* its mandate.

The agreement between the and **UNDP** and UNIDO [382] recognises the role assigned to the **UNDP** by the General Assembly, that is, "to support and supplement the national efforts of developing countries to accelerate their economic and social development". UNIDO therefore agrees to enter into a "partnership role" with the **UNDP** in order, *inter alia*, to help give effect to resolutions and decisions of the General Assembly.[383] Under Article 1(c) of the agreement; the parties recognise "their separate and complementary roles" within the United Nations System to achieve the desired objectives. This recognition of separate and complimentary roles is important in the case of UNIDO whose mandates and objectives were, as stated above, said by some member states to exceed **UNDP** mandates and objectives.

The basic conditions of execution of **UNDP** supported technical co-operation activities by the Executing Agency (UNIDO) are thus those set forth in the relevant and applicable resolutions of the competent **UNDP** organs and in such Basic Agreements as **UNDP** may enter into with Governments[384] and project

documents. The agreement also provides for "termination or suspension of assistance", in cases where it may be necessary to terminate technical co-operation activity or the responsibility of the Executing Agency for such technical co-operation activity.[385] Consequently, the Agency's role in terminating assistance is limited to that agreed with the programme.

Under Article III of the **UNDP** - UNIDO agreement, UNIDO recognises the "leader of the team" role of the Resident Representative in relation to allocation and programming of **UNDP** resources in the relevant country except in cases of resources directly assigned to UNIDO. The Agency also recognises the central co-ordinating role of the Resident Representative at the country level with respect to technical co-operation programmes of the United Nations system. UNIDO agrees to consult and inform the Resident Representative, to the extent feasible, on the planning and formulation of its technical co-operation activity and to provide him with reports on the execution of those activities.[386] Under Article V, the **UNDP** and the Government may observe at any time the progress of any **UNDP** technical co-operation activities carried out by the Executing Agency and UNIDO "shall" afford full facilities to **UNDP** and the Government for that purpose.[387]

Under Article XI(2), **UNDP** and UNIDO "shall consult" and the **UNDP** will be "promptly informed" if any circumstance arises which, in the judgement of **UNDP** or the Executing Agency, interferes or threatens to interfere with the successful completion of a technical co-operation activity, or the accomplishment of its purposes. The parties shall co-operate towards the rectification or elimination of the circumstance in question, exerting all reasonable efforts to that end, including prompt corrective steps by the Executing Agency where such

circumstances are attributable to it or within its responsibility or control. The **UNDP** may, after appropriate consultations, suspend execution of the technical co-operation activities affected by written notice to the Executing Agency and the recipient Government, *without prejudice to the continuation of the fullest consultations.*

Under Article XI (4) failure to rectify the cause of suspension within thirty days' results in a **UNDP** written notice to the government and the Executing Agency terminating the technical co-operation activity or the Executing Agency's execution of the activity in question, with, in the latter case, the **UNDP** taking over execution or entrusting it to another Executing Agency. In case of "transfer" of the its responsibilities, the Agency ensures the orderly transfer of its responsibilities and **UNDP** reimburses all costs the Agency has incurred which are provided for in the Project Document and reasonable costs for winding up of the technical co-operation activity.[388] The Agency may withdraw from execution of and **UNDP** technical co-operation activity if it deems that conditions have developed which compromise or prevent the Agency's successful accomplishment of its role under the project - Article XI (7). The Agency is reimbursed for costs incurred under the legal commitments and costs provided for in the Project Document up to the effective date of the withdraw.

In executing projects, UNIDO may waive the privileges and immunities of operational experts or consultant firms or organisations to assist it in the execution of a technical co-operation activity, under Article XII. Under the Basic Co-operation Agreement between UNIDO and member states receiving assistance from[389] **UNDP**, operational experts are solely responsible to, and are under the

exclusive direction of, the government or the entity to which they are assigned but are not required to perform any functions incompatible with their international status or with the purposes of UNIDO. Waiver of operational experts or consultant firms or organisation privileges and immunities under the UNIDO - **UNDP** agreement by UNIDO under Article XII occurs when in the opinion of the Agency the immunity would impede the course of justice and ca be waived without prejudice to the successful completion of the activity concerned or to the interests of **UNDP** or Executing Agency.

The above and other arrangements illustrate the point that **UNDP** technical cooperation activity occurs under legally formal, transparent and agreed principles and procedures that preserve the sovereign rights of the recipient State and yet promote accountability, mutual assistance and balance of rights and obligations.

3.11 Conclusion

(a) The multilateral measures, principles, institutional mechanisms, etc., as practiced under the **UNDP** Programme and related agencies, are strictly preserved and promote collective international goals, especially the elimination of technological and scientific disparities between states, thus promoting future independence and interdependence of all States, preservation of international peace, etc.

(b) Multilateral practice also reveals the principle of balanced commitments which requires on the one hand technology owning states and their nationals who are awarded contracts under the programme, to recognise lack of technological and related skills by developing country recipients, to avoid abuse of powers, guarantee full and effective transfer of skills (for example, by using the most skilled and experienced firs), offer

technical skills on free or preferential treatment to developing countries, participate effectively in the technical development of the host State in accordance with its laws and international law, etc. while on the other hand, developing countries are to promote conformity of their national legal regimes, relating to international technical cooperation activity, with international law obligations, that is, observation of treaty arrangements with multilateral bodies or international organisations, and provision of transparency and. fair treatment for technological skill supplying parties in their national laws and regulations.

(c) Recipient Governments exercise their sovereign rights to safeguard primary developmental goals, that is, in this context, developmental policy with regard to acquisition of technological capacity. This goal is achieved by extending formal legal measures and instruments to the entire process of pre-negotiation, negotiation and acquisition (for example, through project implementation, assimilation of technological skills etc.) of the desired technological skills.

(d) Promotion of preferential treatment and other special measures for developing countries in order to assist developing countries to acquire technological skills without coercion and coercion and on terms that mitigate or eliminate bargaining and negotiating power disparities, for example, by providing a negotiated, transparent and formal legal framework that regulates the terms for supply of skills to developing countries by all parties both public and private.

(e) Promotion of mutual cooperation and collective self help between member states is promoted through specific regional and national instruments and measures.

(f) Protection of developing countries, especially the least developed among them, from the negative effects of the current unilaterally restrictive terms and conditions otherwise used by technology owning states[390] (or monopolistic practices at the private level), when supplying any technical skills to developing countries;

(g) Encouragement of the adoption of the various principles, for example, interdependence, equal participation, transparency, preferential treatment, etc., that have been developed under the programme's in multilateral practice, for example, major multilateral arrangement for international technological cooperation, (see the example of the Lome Convention and Andean Pact arrangement for international technological cooperation, (see the examples of the Lome Convention and Andean Pact arrangements, discussed in the next Chapter).

From the foregoing, we may briefly conclude that the international context - technological, scientific, economic, cultural conditions within each State and multilaterally under which international development and transfer occurs is very crucial to the determination of workable legal norms to regulate such activity. This context has however previously been omitted from consideration, leading to the recommendation of norms or rules which do not achieve desired results or promote balance of commitments between parties to international technology development and transfer transactions. Because of the varying conditions in most States, the multilateral framework as exemplified above has adjusted the legal treatment of its members to promote their acquisition of technological capacity while preserving multilateral or joint international goals and allowing modification of rules, procedures etc. to fit new conditions.

The multilateral framework has therefore helped to adjust bargaining and negotiating disparities, mitigated or eliminated abuse of rights by suppliers of technological skills to developing countries while at the same time promoting the assumption of due obligations, including local skill, financial and institutional contribution by those States seeking to acquire technological skills.

CHAPTER FOUR

Multilateral[391] and Inter Regional Arrangements For Development and Transfer of Technology, a Solution? The Example of International Technological Co-operation under the Lome Convention and Andean Pact Arrangements

4. Introduction

> "No other co-operation instrument in the world has instituted such carefully planned, concrete and positive ties. The originality of the convention of Lome lies in the fact that it covers all forms of development *aid*: preferential access to the Community market, the financing of projects by the European Development Fund, the stabilisation of export earnings and the mining system *cover all aspects of development*"[392]

> [Lome is about nothing, if not about the practical question of development facing the ACP states].[393] [Trade promotion measures are pointless if the products do not exist].[394] [The facts are there, palpably so, and they indeed show that ACP economies have not developed, quite the contrary. This goes for every sector of the economy"].[395]

Despite the relatively high effectiveness of international multilateral arrangements to transfer technological skills to developing countries,[396] the majority of developing countries are still far from attaining local technological capacity. This is largely due, to the financial and other non legal limitations that have been imposed on the international multilateral programmes, especially those of the United Nations. These limitations, as discussed in the previous chapter, may limit a country's participation in programme activity even if such limitation is detrimental its long term interests.

To compensate for the effects of the practical and non legal limitations imposed on the multilateral system, developing countries have sought, and entered into various international arrangements with the aim of, inter alia, enhancing and

extending legal regulation to the entire technology acquisition process. Some of the arrangements are between developing countries inter se, others are concluded with developed countries. Two of these arrangements were hailed, at the time of their coming into force, as of a "revolutionary legal nature" or even as models for future legal arrangements for, among others, promotion of more effective acquisition of technological capacity by developing countries whether between themselves or in partnership with developed countries. It is to these two arrangements, that is, the Lome Convention[397] a treaty between the Sub-Saharan Africa, Caribbean and Pacific area states on the one hand and the member states to European Community on the other and the Andean Pact arrangements,[398] that we next turn in order to show whether:

(i) Each arrangement contains any novel or innovative international legal measures, instruments, provisions etc., which inter alia, promote:

(a) Effective acquisition of technological capacity by developing member states:

(b) Extension of international legal norms to the entire process of international technology transfer arrangements, as defined above,

(c) Preferential treatment and access to technology for developing countries and their nationals, in accordance with the goals of a new international order;

(d) Adequate safeguards for developing countries seeking to acquire technology from non State parties who are nationals of developed countries, for example, to prevent the imbalance and discriminatory effects that would be caused if developing countries member to the treaty arrangements were required to extend national treatment to nationals from developed countries, regardless of technological capacity acquisition goals or bargaining and negotiating power disparities between parties;

(e) Transparency is ensured during the process to transfer to and develop systematic and practicable knowledge in developing countries, that is

during the pre-negotiation, negotiation, performance, follow-up and settlement of disputes stages of and technological cooperation activity undertaken between the parties.

(f) Mutual self-help between parties undertaken, that is, specific joint mechanisms, measures, institutions etc. have been created to promote acquisition of technological capacity by developing country members;

(g) The technology acquisition interests of developing country members, where the treaty is between developed and developing counties, are subordinated to those of the developed country members.

4.1 Lome, a Model Arrangement for North -South Technology Transfer?

The Lome Convention,[399] has been said to be a model example of the type of arrangements that should characterise the New International Economic Order (NIEO). This claim rests on various declarations and claims, made principally by the community or its jurists and scholars. The arguments advanced by community jurists in favour of the convention are numerous. These include claims that the convention obligates a lager number of states to concrete NIEO - relevant conduct, with firm and tangible obligations for all parties and offers ACP states access to a broad range of development aid instruments. The Convention is further said to provide a secure framework for cooperation and implementation of rights and obligations resulting from a freely negotiated contract.[400]

The establishment of common institutions is said to facilitate permanent dialogue between the partners, for example, Council of Ministers, Committee of Ambassadors, and Consultative Assembly.[401] The institutions are supposed to ensure that Lome is a partnership of equals. It is further argued that the collective

nature of the contract concluded between the two sets of country's rules out discrimination of political, economic or other nature.[402]

From these and similar arguments, it is then naturally concluded that from the Yaounde Convention to the current Lome Convention, "the parties are resolved to establish a new model for relations between developed and developing states, compatible with the aspirations of the international community towards a more just and more balanced economic order."[403] The "positive development provisions" of the Convention are well summarised by the European Community in its General Agreement on tariffs and Trade (GATT) Trade Policy Review Report for 1991.[404] According to the report, Lome maintains and develops traditional economic and commercial relations between EEC member states and developing ACP states. To achieve this objective, the convention provides for "wide ranging" cooperation agreements, including financial aid, technical cooperation [405] and specific non-reciprocal trade preferences. [406] The Convention also offers, in principle, preferential and favourable non reciprocal treatment to ACP member states in several areas, for example, reduction of barriers to their trade,[407] compensation for shortfalls in export earnings, [408] etc., using most established methods to this end, including trade and industrial cooperation, financing and promotion of investments[409] . Under "protocols" guarantees of market access are given for specific commodities, for example, sugar, bananas, beef and rum.[410] Lastly, the Convention is said to "innovate" by granting special advantages to the least developed among the ACP states and providing risk capital financing of industrialisation projects.

4.2 Lome - technology transfer through technical aid?

The foregoing conclusions are largely a-historical and reflect a literal legal analysis and interpretation of the detailed armoury of provisions that is the Lome Convention that leads to the conclusion that the Convention is equally, freely and voluntarily negotiated by sovereign states. Under this interpretation, implementation of Lome Convention development objectives is on the basis of priorities, strategies and objectives established by ACP states.[411]

However, despite its prolific provisions (running to over 360 Articles and various Protocols) even the latest Convention only modifies and preserves traditional relationships between some of the world's most highly industrialised states and the least technologically advanced states. Few of the Convention's provisions are actually related to transfer and development of technology between the ACP and EC states, a subject traditionally accorded little effective attention by the Community.[412]

Successive Lome Conventions have therefore continued terms which in effect were first set out under Treaty of Rome (Part IV) provisions which provided for a unique legal form of "unilateral association" between the Community and its member states and Overseas Countries and Territories.[413] Under the association policy,[414] associated states and territories were to participate in free and exchange trade with the EC through, inter alia:

(i) Mutual abolition by both groups of trade barriers;

(ii) Non discrimination between imports from all member countries and territories;

(iii) Offer of rights of establishment for enterprises from other member states by each member State;

(iv) Guarantees of freedom of movement for labour and other economic factors;

(v) To offer all nationals of member States wishing to tender or supply under projects financed by the Community, "open and equal" terms and conditions.[415] In technology transfer terms, this condition is particularly important, as we shall show below since it facilitates, inter alia, the continued monopoly over technological activity in ACP States by enterprises from EC States. *Almost all the above five "fundamental association" provisions are mirrored under Lome IV.*

4.3 Lome Conventions - technology development and transfer related provisions

The various Lome Conventions have either omitted or inadequately provided for technology transfer to ACP States. Under Lome, the EC in practice primarily provides finance, and technical assistance (or co-operation) as a "package". This interweaving of finance into all technical assistance activity in practice means that Lome provisions are interpreted by the Community not as technology transfer or technical co-operation but as the *procedures and methods for use of funds* it provides to ACP States, except under STABEX.

Lome convention provisions which may be said to be of direct significance for ACP - EC technology transfer are relatively sparse. However, Lome IV in principle tries to meet much of the criticism that the previous Conventions did not address or inadequately addressed. These include effective participation by ACP nationals in

Fund-financed technologic activity in ACP states, promotion of technological capacity in ACP states, promotion of mutual self help or regional intra ACP technological cooperation, safeguards against imposition of technical "aid" by the Community, etc. The major provisions and measures under successive Lome Conventions meant to promote acquisition of technical skills and other skills by ACP state and their nationals include:

4.3.1 Industrial development, manufacturing and processing [416]

The objectives under this head prioritise the agricultural, rural development, "manufacturing", mining, energy, infrastructure and services sectors. Under Article 78, industrial development cooperation activity would promote conditions conducive to industrial enterprise development, local and external environment - Article 78 (b). Industrial cooperation would also foster the creation of joint ACP - EEC enterprises, especially those of a small and medium enterprise nature that produce and use local inputs- Article 78 (d), and participation by ACP nationals in such enterprises would be promoted. This objective would be achieved through, among others, promotion of increasingly close relations between community and ACP states, especially through the establishment of industrial joint ventures - Article 78 (f).

For the least developed, land locked and island States, Lome IV promises community special attention to their needs. Such attention extends, inter alia, to their raw materials processing needs, development, transfer and adaptation of technology, development of industrial infrastructure, medium enterprises, provision of adequate training in scientific and technical areas, etc. Funds to implement

these provisions are to be availed through the Centre for the Development of Industry.[417]

4.3.2 Investment Promotion.

The Lome (IV) Convention provides that enterprises should comply with the objectives of development co-operation under the Convention. It also requires them to comply with the requirements of the *appropriate laws and regulations of their respective* States - *Article 258 (a)*. In practice, the law of most EC States requires liberalisation of the economies in favour of private enterprise, leaving issues such as transfer of technology to be determined by parties. Proof of the dominance of the EC view in interpreting the Article is present in further requirements of the Article which in effect require ACP States to provide:

(i) *Fair and equitable* treatment to investors - Article 258 (b);

(ii) Provide *transparent investment regimes*, that is, take measures and actions which help to create and maintain a predictable and secure investment climate - Article 258 (c);

(iii) To promote, inter alia, technology and know-how transfer, co-operation is to be encouraged between ACP and EC enterprises - Article 258 (d). These provisions, while encouraging positive factors such as transparency of local investment regimes, are nonetheless effectively binding on ACP States to provide "liberal" investment climates, that is, provide, *de facto*, national treatment to EC firms. To guarantee the liberal investment regimes, ACP States are encouraged, under Articles 260, 261 and 262 to enter into

bilateral agreements and special arrangements for the protection of EEC originating investments.[418]

4.3.3 Technical Cooperation

In terms of transfer and development of technology, these provisions in principles constitute the most important measures. However, as already stated, their impact is weakened by, among others, their being integrated into the financial measures,[419] the lack of specific formal and transparent legal mechanisms to implement them, the lack of a formal joint technological policy[420] between the EEC and ACP states, etc., which effectively obstruct the ability of ACP states to effectively negotiate for and participate in Fund financed technological activity.

The Salient provisions for Lome technical cooperation *are*:

Technical cooperation is to assist ACP States in their national and regional development. Consequently, such assistance is availed at the request is availed at the request of the ACP State(s) on a cost effective basis,[421] favouring the transfer of know-how and promotion of national and regional capabilities.[422] To promote national capabilities technical assistance personnel "shall" be qualified for the specific tasks as defined in the request form the ACP State and "shall" be integrated within the beneficiary ACP institutions.[423] Technical assistance personnel shall promote effective training of national personnel in ACP States, enhance the capacity of ACP States to build local technical skills. The community would further promote ACP State's technological growth by encouraging cooperation partnerships between consultancy firms, consulting engineers, experts and institutions of the member States of the community and those of the ACP States.[424] Under Article 277, the Community undertakes to take practical measures to increase and improve the information available to ACP

States. Article 278(d) requires ACP States and Commission delegates considering a request(s) for technical assistance to compare costs and benefits of different ways of transferring technology and increasing local technological capabilities. The above outlined principles are the primary principles that govern Lome Convention technical co-operation and any technology transfer activity. The provisions, while binding on ACP States to undertake specific measures through their country programmes and project submissions, do not bind the EC to any specific commitment except the allocated sum under the EDF and EIB funds.

4.4 Lome and Technology Transfer to ACP States - the Practice.

Lome Convention technology transfer objectives, like the objectives of the association policy, are theoretically sound but flawed in practice because they, inter alia:

(a) Do not include specific provisions and mechanisms for the elimination of the gross material (especially technological) inequality between EC States and ACP States;

(b) Prevent EC policy conflict with that of the associated States, for example, under the Common Agricultural Policy;[425]

(c) Are increasingly, as detailed below, based on conditionalities, especially "financial efficiency"[426] and private property protection and promotion requirements.

The impact of the Lome Convention's on the technological development of ACP States can only be accurately assessed if the Convention's legal provisions are weighed against:

(1) The increased number of ACP least developed States during the life of the Convention, and the decline of their share of the EC market during the same period. The ACP - EC Joint Assembly Resolution of March 1990[427] (whose decisions are not binding on the contracting parties),[428] noted, among others:

(2) That since the Paris Conference on least developed countries (1981) the number of ACP States defined as least developed, far from diminishing, had in fact increased- clause (c) of resolution;

(3) That during 1981 - 1990 most ACP countries had experienced a decline in their agricultural production, a considerable increase in their imports of food products, an absence of industrial development and a weakening of nascent industries - clause (d) of resolution,

(4) That 95% of ACP exports to the European Community consist of Agricultural commodities and raw materials; with EC exports to ACP States consisting of 80% manufactured goods - clause (g) of resolution;

(5) That since the first Lome Convention, signed in 1975, the ACP share of imports into the Community market had been reduced by half - clause (h) of resolution;

We show below that the condition of ACP States, in terms of technological development (through inter alia, technology development and transfer), as in other areas of potential conflict between EC and ACP States interests, is due to the continuation under successive Lome Conventions of the 'traditional' lack of inherent

safeguards for preservation of recipient vital interests[429] unless they lie outside those of the EEC. Yaounde and subsequent Lome Conventions legitimised and formalised near unilateral determination by EEC States of the `key' terms, conditions and institutions[430] that govern ACP - EEC technoeconomic relations. Such legitimating was rendered necessary after the independence of now ACP States, since `few' bilateral treaties had been concluded by EEC metropolitan States with the then dependent territories, leaving large areas of ACP - EEC relationships covered largely by non binding informal arrangements.

With specific regard to technology development and transfer, the Lome Convention does not significantly advance the position of ACP States beyond the inadequate positions prevailing under bilateral treaties or informal aid and assistance arrangements. The terms and conditions under the bilateral treaties, (many of which are still in force) whether the treaty referred to technical assistance or cooperation, were essentially unilateral, excluding active participation by ACP States or their nationals.[431] This contention is supported, inter alia, by the fact that Lome, despite provisions on programming of `aid' project design and appraisal, implementation of projects, evaluation of results, does not provide for a joint technology policy between the EEC and ACP States[432] or contain specific provisions and mechanisms for formal negotiation of technical cooperation [433] (vis-à-vis technical aid), for example, by providing formal opportunities for full negotiation of terms and conditions, including formal opportunities for full negotiation of terms and conditions, including formal opportunity for rejection of assistance by recipient States. For instance, the Lome IV Convention, Article 295 provides for general guarantees by the Commission to ensure equal participation by ACP local consultancies, engineering firms, local skills, etc. In practice, as noted below, these general guarantees are not accompanied by specific transparent procedures.

The Convention also provides for fixing of total available aid for each country by the Community,[434] *informal* exchange of views on negotiation of indicative programmes[435] and inevitably, financing of resultant projects. Successive Lome Convention's have contained other substantive provisions and institutional measures, discussed below, which directly or indirectly restrict ACP States (that is, public bodies or other nationals - natural and juridical) in their negotiation for, acquisition and dissemination of foreign technology. Some of the most important of these factors are:

4.4.1 EC Market entry controls and Technological Development in ACP States

The granting of access privileges to the EC market almost exclusively for low technology products[436] (non sensitive) including restriction of industrial (medium or high technology) exports into the EC under voluntary export restraints (called agreed quantity arrangements in Convention usage) or use of rules of origin and *proof* of origin requirements.[437]

4.5 Rules of Origin, foreign resource flows and effective transfer of technology

The Lome Convention's provisions on rules of origin[438] require that products be not considered as originating in ACP States for purposes of duty free entry unless the components that originate in third countries are subject to sufficient working or processing. Consequently the basic criterion requires a change of tariff heading as between materials used and the finished product.[439] Though these rules have been modified under, for example, by lowering the value added requirement to 45% under Lome IV down from 60% under Lome III and addition of an automatic general

derogation clause, the fundamental problems, in technology transfer terms, remains untouched. This is due to the fact that the less developed a country is, the more vital are external injections of resources. The traditional form of external resource injection in LDC's is direct foreign investment or capital.[440] Capital investments in countries with weak structural and technoeconomic bases, though important in themselves, nevertheless are of secondary importance to technological and management know-how transfers.[441]

Rules of origin, by directly linking trade with foreign flows of resources into ACP States, thereby ensure that the rate or ability of ACP States, especially the least developed among them, to attract external technological and managerial know-how is determined by their ability to negotiate for, acquire and assimilate such foreign technological and managerial know-how *divorced of foreign capital investments, except those originating in the EC.*[442] Lacking a "capital base'' the majority of ACP States therefore, remain unable to acquire any technological know-how and consequently are unable to diversify their export base or add value to exports, thus preserving the traditional division of labour between the EC and ACP States;[443]

Because of the fore-mentioned presumption of equality EC natural persons, companies or firms (who or which often own the majority of industrial rights granted by ACP States) receive equal treatment[444] in invitations to tender and award of contracts for implementation of Lome funded[445] projects. Such EC firms can also be financially supported under the convention.[446] Since the Commission determines the level of technical assistance activity to be undertaken, it has often unilaterally interpreted assistance or co-operation, for example, as supply of EC specialists[447] and firms that may even be imposed when not requested[448] by an ACP State.

Consequently, ACP "recipients" are as a rule largely unable to participate in execution of projects, procedures for recruiting specialists or consultants as determined by the Commission are frequently not transparent,[449] the cost of technical assistance may be excessive in relation to a country's indicative programme and there is no formal assessment of whether effective technology transfer to the ACP State in question[450] has occurred. Further, technical "aid" or assistance is interpreted by the Commission as *indefinite* `in nature. This was noted in a report of the Council of Ministers thus:

> "...while the raison d'être of technical assistance is to make systematic preparation for its withdrawal, it is often instead an integral part of European Community's co-operation policy, *with no time limit*"[451]

4.6 Lome, "Equal" Treatment for EC Enterprises and ACP technological growth

Because of the underdeveloped nature of ACP States and the "exclusive" nature of Lome "aid", such aid often takes up a large potion of *technoeconomic* activity in these States. Not withstanding the above mentioned Convention general provisions on enterprise compliance with the legal requirements of the recipient State, in practice, ACP States are increasingly incapable of regulating the technological activity of EC based enterprises operating on their territory, especially those implementing Lome projects, since such activity is automatically approved under general tender and project implementation terms.[452] Consequently, in relation to EC based enterprises, ACP States:

(a) Cannot encourage their local enterprises, through legislation or otherwise, to take full opportunities to explore alternative sources of technology, except within the EC,[453]

(b) Have to abstain from regulating (to influence effectiveness) EEC base companies technological activity on their territory, for example, through regulation of collaboration agreements, joint ventures, etc. between ACP - EEC enterprises especially through approval and assessment procedures.[454] Consequently, EEC firms are able to impose virtually any arrangement, for example, prohibiting ACP enterprises to sub licence or share know-how, since ACP firms are, inter alia, left to negotiate the terms of any technology transfer according to their own judgment, which is at best commercially motivated and rarely fully informed;

(c) Legitimise and perpetuate `tied' historical export arrangements under which enterprises procure capital goods, components, spares, raw materials, etc. from the EEC;

(d) Cannot control EEC private enterprise research and development activities or facilities within their territory. Subsequently, most projects show inadequate or no attention to development of such local facilities;

(e) Control increasing use of conditionalities, especially economic and financial ones, such as requirements for an increased role for private enterprise[455] in Lome Convention EEC funded activity.[456] The requirements for use of private enterprises in major ACP - EEC `technical cooperation' ensures that EEC based enterprises, which own the majority of industrial property rights registered in ACP States, dominate *technoeconomic a*ctivity in those States without any specific policy for regulation of their activity under Lome, though regulation, coupled with the requirement for ACP States to allow an increased role for private enterprise in ACP - EEC technical cooperation activity, negates chances of ACP nationals and enterprises gaining ability to compete with EEC based firms, despite provisions such as those under Article 295 of Lome IV for `participation on equal terms', thus effectively reducing access to technology for ACP enterprises.

From the foregoing, it may be concluded that the ACP - EC technological co-operation on the basis of equality and reciprocal relations, though assumed in Lome Convention theory, is not achieved *(vis-à-vis achievable)* in practice. Rather, the policy of the EC defining technical co-operation as a mixture of aid and technical assistance and therefore linked inextricably primarily to finance rather than development, which was initiated under the Yaounde Convention[457] is continued. It is in this light that provisions relating to programming as the basis for equal participation in EC sponsored aid under Lome are to be viewed.

4.7 Institutional Arrangements for EC - ACP technological co-operation -

Substantive Provisions

Institutional provisions for technological co-operation under the Convention are at best weak. Existing Lome Convention institutions fall far short[458] of providing transparency, that is, in formal consultation, evaluation, review and monitoring of technical co-operation undertakings (including rate of disbursement of allocated resources to recipient States), and decision making between the EC and ACP recipient States. The institutions do not deal with disparity in bargaining and negotiating power and thus do not change historically created unilateralist decision making structures, funded by the EC and extended to cover now independent ACP States "technical aid" programmes originally executed under individual bilateral treaties.[459]

4.7.1 Institutional Unilateralism or non parity - the Practice

The Lome Convention in principle provides an institutional forum for permanent dialogue through the three joint institutions,[460] that is, the Council of Ministers, Committee of Ambassadors and Joint Assembly. However, in relation to technology transfer, all main institutions are centred on, and principally operate from within the Community.[461] No specific "joint" policy or provision exists to promote institutional undertakings already in the ACP region to deal with Lome Convention requirements.

Conditionalities, as noted above, are increasingly placed on industrial co-operation, requiring ACP States to adopt specific policies as a precondition for favourable and continuing co-operation. These conditionalities are enforced by substantive and procedural requirements over which the ACP States have no control, that is, preconditions for assistance required by the European Investment Bank[462] and the European Development Fund. For example, the European Investment Bank (EIB) which is charged, along with the European Development Fund (EDF) with the task of financing applications for projects or programmes in industry including agricultural processing, mining, tourism and energy and infrastructure,[463] may in theory disburse funds through private, public or semi - public ACP or EC enterprises. The negotiations for such assistance between the potential recipient ACP State and the Bank are carried out in co-operation with the Commission and the Bank's own borrowers.[464] In theory proposals made by ACP States in their Indicative Programmes,[465] are not binding on either party and may be subsequently altered. The EIB may grant loans only where the execution of the project contributes to an increase in economic productivity in general.

However, because the EIB is autonomous from its owner States and raises the bulk of its resources on the capital markets, its participation in Lome activity is fundamentally, commercially motivated.

The Bank has ensured that:

(i) Projects and programmes are appraised primarily on the basis of its statute, that is, the Convention or the Internal agreement do not set down conditions according to which the bank may make loans from its own resources, that is, grounds for disbursal are in effect discretionary to the Bank. In practice, the Bank exercises this discretion by offering loans from its own resources principally to those *most favoured (credit worthy)* ACP States "whose economic and financial situation enables them to borrow at more selective conditions";[466]

(ii) Any risk capital to be provided by the Bank is to be availed only subject to presentation of "acceptable" projects to the Bank and the type of financing that is most appropriate, is determined by the Bank, that is, the decision to fund the activity is made by the Bank's directors on the proposition of its management committee.

4.8 Dispute Settlement

The Lome IV Convention contains relatively few provisions on dispute settlement. Under Lome III and earlier Conventions, ACP borrowers and guarantors were offered, on signing the Convention, the *choice of law of one of the EC member*

States. Under Article 181 of the EC Treaty, the European Court of Justice has jurisdiction to give judgement pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private.

Under Lome IV, Article 307, disputes arising between ACP States and a contractor, supplier or provider of services during the performance of a contract financed by the Fund shall:

(1) In the case of a national contract be settled in accordance with national legislation of the ACP State concerned;[467]

(2) In case of a transnational contracts, be governed, if the parties so agree, by the law of the host State or "*its established international practices*"

or

(3) By arbitration under rules established by the Council of Ministers, as recommended by the ACP - EC Development Finance Co-operation Committee.

4.9 Some Conclusions

The Lome technical co-operation provisions are very inadequate in relation to actual needs of promoting transfer and development of technology to ACP States. This is primarily because:

(i) Lome disguises command relationships under free choice, that is, the extreme technological disparity between the two "partner" groups can only be offset through implementation of comprehensive, transparent and formal measures with specific mechanisms and institutions for their implementation.

(ii) Negotiation and implementation of arrangements between two groups of States with very unequal negotiating and bargaining powers must contain inherent safeguards for the position of the weaker party, that is, the effective decision making bodies such as the EDF and EIB are not open to ACP membership or formal legal participation, yet virtually all legal and other policy for the implementation of Lome agreements must inherently comply with the principles on which these institutions base their decisions. Consequently, ACP States do not have formal and legally binding channels under Lome for rejection of terms and conditions for "aid" set by the EC, though politically, the ACP may state their case through the joint institutions such as the Council of Ministers;

(iii) The legal presumption of juridical equality has been continued into the technoeconomic sphere, requiring ACP States to offer national treatment to EC enterprises, though for instance, the EC is aware of the imbalance and discriminatory effect that may result from blanket application of the most favoured nation treatment in all cases.[468]

(iv) Lome, as an integrated `package' of capital, trade and other legal and non legal obligations, binds ACP States to EEC sources of technology and skills which can only be departed from with the consent of the Community States. Further, the ACP States suffer diminished ability to influence technology transfer and development activity of EEC based enterprises undertaking Fund supported projects on ACP States territory or regulate restrictive practices involving ACP - EEC enterprises, even if such practices obstruct, inter alia, acquisition of technological capabilities in the ACP State, especially since Lome obligations prevail over parallel national or bilateral measures and arrangements.[469]

4.10 The Andean Pact Arrangements and Promotion of Transfer and Development of Technology

Among developing countries, the use of a regional or sub regional measures, technological policy and use of special and preferential treatment to promote technological development in member States was pioneered by the Andean Pact countries. The sub regional technological policy aimed inter alia, at local production of technology, redemption of know-how already existing in the sub region, selection, importation, adaptation and assimilation of foreign sourced technology, etc.[470]

These regulations[471] passed under the Cartagena Agreement included measures for the promotion of a joint or sub regional technology policy and provided for the establishment of a sub regional technological information system (SAIT) and a system for promotion of assimilation and development of technology relevant to or appropriate for the sub region (PADT) which could promote local innovation and

ensure local exploitation of protected inventions and processes.[472] Further, to ensure preservation of material and juridical equality among member States, special and formal preferential measures were included to protect Bolivia and Ecuador. These measures included special concessions in the industrial sector such as designation of plants, automatic assignment of production, etc. These measures proved of practical value in promoting the technological, trade, industrial and other sectors in these two member States.

The joint technological policy was meant to ensure adequate local exploitation of all intellectual property rights protected in the sub region. The policy ensured that:

(a) International technology development and transfer contracts were in conformity with legal requirements. This was to be achieved by requiring submission for approval of all agreements involving import of technology and licensing of patents and trademarks to the competent national authority;[473]

(b) That specific terms and conditions were incorporated into the technology transfer contract. Though technology transfer contracts do not contain technological information but only the legal terms necessary to provide balanced entitlements for the parties,[474] it is important for evaluating authorities to assess the potential contribution of imported technology to the importing State, the price or royalties payable under the contract, determine whether duration of the contract as agreed is equitable, in short, ensure that the contract is in accordance with choice and not command;

(d) Harmonisation of technology development and transfer contractual obligations or immediate goals with the general *technoeconomic and legal* requirements of the host State. This requirement necessarily overlaps in practice with those of the foregoing subsection . The Andean Pact provided the first `extra' national regime among developing countries to try and control or eliminate restrictive practices,

in technology transfer contracts involving non nationals, which could frustrate local development of innovative capability or the assimilation and effective use of imported technology, etc. Though now modified, the joint technological policy contained various provisions to control, among others, tied purchases (that is, procurement of technology, from sources set by the supplier), prohibition of use of rival technologies, binding purchase of technology to an exclusive grant back of improvements made by the recipients, payment for unused rights, etc. Further, to enhance technological innovation and development in the region, the policy required that preferences be given to products incorporating sub regional technology;

(d) Identification of the regional provisions and law of the host State as the law applicable to all technology transfer transactions in the region.[475]

Among other measures in the joint technological policy for the promotion of local technological capacity and fairness of agreed technology transfer contracts, were

(i) Under Article 1 of the rules, patents could be granted for new creations capable of industrial application and for those which may complement such creations. This measure was meant to ensure, inter alia, that countries wishing to promote local innovation through import of technology, the patenting of local improvements and local inventions that can be used to resolve a locally felt need but do not otherwise meet an international inventiveness standard, were protected. Article 28 of the regulations provided that a patent `shall not confer an exclusive right to import the patented product or one manufactured under the patentee's process'. Local exploitation of patented inventions was to be ensured through the initial grant of a five year protection term for patents and if the patentee was interested in the extension of the patent term to the maximum period of ten years, such

patentee would have to prove to the competent national office that the patent was being adequately exploited - Article 29.

(ii) Patentees were required to submit notice to the competent national organs that exploitation had commenced within three years of the grant of the patent. Failure to submit such notice of initiation would give rise to a presumption of non - exploitation, which could facilitate the grant of compulsory licences - Article 30. Exploitation was defined to mean the "permanent and stable use of a patented process, or the manufacture of a product protected by the patent, to supply the market with its final results under reasonable trade conditions, provided such acts were undertaken on the territory of a member State or as part of the Sectoral Programmes of Industrial Development" - Article 31. The holder of a compulsory licence could not transfer it or grant sub licences without authorisation by the owner and proof of initiation was also applicable to such holder of compulsory licence - Article 38. Under Article 34, compulsory licences could be granted after the expiry of three years from the date of patent grant subject to proof of certain acts having occurred, for example:

(1) Non - exploitation within the relevant country,

(2) Suspension of exploitation for more than one year by patentee;

(3) Failure to meet reasonable requirements of quantity, quality or price as demanded by the local market;

(4) Unreasonable refusal to grant contractual licences to an applicant who could satisfy the needs of the national market in terms of quality, quantity or prices; or, if granted five years from the date of

the initial patent grant, without proof of the above acts having occurred. Applications for compulsory licences were open to `any person' though the national office could give a justifiable, legitimate excuse for the refusal of a compulsory licence. Patentees whose inventions were subjected to compulsory licences were to be given a hearing by the relevant national office and could file a suit after the exhaustion of the administrative procedures, though exploitation under compulsory licence or the running of the time periods would not be influenced by the filing of the suit Article 36.

It may be useful to stress that the above outlined joint technological development and transfer policy has not, like the rest of the sub regional policy relating to, inter alia, capital investments, finance, trade, etc. been substantively modified[476] since it was largely in line with international obligations and sovereign rights. However, as noted in Chapter 5 above, related provisions such as those dealing with procedural or financial obligations (for example, royalty payments, repatriation of profits, ownership of enterprises, etc.) as contained in Decisions 24 and 58, have been modified under Decisions 311 and 313.

Lastly, modifications under Decision 313, are meant to promote territoriality and enhance sovereign control over technology policy,[477] for example, though voluntary extra (national) protection for given technological rights. Thus for instance, under Article 119 of Decision 311, Andean Pact countries could enter into industrial property treaties with non member States, provided such treaties or commitments did not contravene the provisions of Decision 311. Article 118 of Decision 313 changes this rule, by allowing a member State that so desires to enter

into intellectual property treaties with third States for the purpose of offering, among others, higher levels of protection than that offered under the common regime, to such third parties. Further, Decision 313 relaxes provisions on intellectual property rights that are not central to technological development, such as trademarks or product patents for products that involve mature technologies such as most pharmaceutical products, that is, member States may now allow patentability for *any* pharmaceutical product. Under Article 98 of the same Decision, member States may only cancel trademarks that have not been in use in any Andean Pact country for the preceding five years, while under Article 99 of the repealed Decision 311, trademarks not in use in all of the Andean Pact countries were to be cancelled.

4.11 Conclusion

The Andean Pact arrangements have, inter alia, helped member States to:

(i) Promote technological parity and mutual self help amongst themselves, that is, through a joint technological policy, specific safeguards and preferential measures, thus safeguarding material and technological equality among the member States and performance of common goals, in accordance with international law and policy;

(ii) Adopt and enforce legal measures which mitigate bargaining and negotiating power between technology owners and Andean nationals, that is, prevention of abuse of rights granted to non nationals;

(iii) Ensure transactional transparency;

(iv) That the price paid for imported technology is adequate and correct for the technology supplied; (that is, recipients were allowed to accept restrictions if they were convinced that the price corresponded to international levels).

(v) Recent modifications to the regime, while reversing or eliminating absolute or mandatory regulations relating to the general foreign investment regime, have only modified the joint technological policy in its *financial and procedural* aspects and not its substantive provisions which are in line with international law and promote effective development and transfer of technology in the sub region.

CHAPTER FIVE

Treaty Based State Practice And The Progressive Development Of International Legal Measures For The Regulation Of International Development And Transfer Of Technological Capacity: *From International Concession Towards Balanced Commitments and Entitlements*

Introductory Note

"The enquiries of the jurist are in truth prosecuted much as inquiry in physics and physiology was prosecuted before observation had taken the place of assumption"

Sir Henry Maine, The Development of Law - In The Political Economy of Law - a Third World Reader, edited by Yash Ghai, Robin Luckman & Francis Synder, Oxford University Press, 1987 at p. 35.

In preceding chapters, we have examined, inter alia, the traditional problems relating to the role of public international law in facilitating access by all States *to advances in science and technology while ensuring that all* States *observe their primary responsibility for their own development and move towards law and co-operation away from unilateralism and absolute sovereign autonomy. The role of non* - State *actors in international technology development and transfer, the legal impact of such actors acts on technology "recipient" countries, the legal reaction of technology importing* States *to international technology development and transfer activity and the effect of such reaction on the progressive development of public international law, remain as yet largely unexamined.*

Below, we argue that international legal regulation (multilateral vis-à-vis autonomous or private party regulation) of the entire technology transfer process, for instance, formulation, negotiation, acquisition, performance and follow up of international technology development and transfer arrangements, is progressively crystallising. Multilateral legal regulation is a response to the scale and importance of international transfer and development of technology which has decreed, in the past, State *legal and non legal intervention, both in developed countries (anti trust laws and technology export prohibition, for example, through COMECON)*[478] *and developing countries*

national and regional measures (for instance, direct regulation statutes and other technology transfer laws and measures). This State regulation is however increasingly influenced by international legal growth created by various international technology development and transfer related Treaties and Conventions (for example the Code on Restrictive Business Practices, the Law of the Sea Treaty, etc.), various resolutions and Decisions of multilateral organisations and institutions, etc. Further, the importance and role of private technology development and transfer agreements between nationals of recipient States and non nationals in technological development of most LDC's has necessitated the revision of legal presumptions in national laws, for example, in relation to application of recipient State's sole legal jurisdiction to such arrangements and their resulting rights and obligations. As a result of this influence on national direct regulation and anti-trust statutes, many important legal principles of an international legal nature have evolved in the regulation of international technology development and transfer. These include:

(i) The principle of balance of commitments, for instance, the legal determination of rights and obligations vis-à-vis non legal determination

(ii) The principle of divisibility of rights and obligations vis-à-vis `package' transactions;

or

(iii) The principle of transparency;

(iv) The principle of accountability;

(v) The standard of fair and favourable treatment which recognises, inter alia, the need to avoid perpetuation of material (technological) inequalities between States, negotiating and bargaining power gaps between State and non State parties, etc.

In addition to elaboration of the fore mentioned principles, we show the link between the enunciation of international transfer and development of technology policy and goals, the crystallisation of international law by States which imbues such policies and goals with the

force of law and impact of these measures on the continuing formulation of international legal norms for the transfer and development of technology, for example, under the United Nations Code of Conduct for the Transfer of Technology, The United Nations Code on Transnational Corporations, The Uruguay Round, etc. In our discussion, we avoid, on grounds stated, inter alia, in Chapter 1 above, the circular hard and soft law debate that has characterised discussion of the nature of any legal measures taken in this area and the equally circular monist - dualist arguments on links between national and international law. Instead, we examine the activity itself, the subjects and parties involved, the resultant interacting processes and their impact on related State activity of an international legal nature or result, for instance, the harmonisation of the collective interest with regard to international technology development and transfer ***which inherently constitutes law*** *on the subject.*

5.0 The Problem

5.1 Technology Transfer, public interest in LDC technology importing States and private property rights

The majority of States now accept the right of each State to take specific legal measures,[479] compatible with international law, for the regulation of international technology development and transfer; as part of the progressive development of international law. Such measures, constitute a new form of treaty based law and State practice that does not fit neatly into the sharply demarcated traditional divisions and classifications of international law sources as set out under Article 38 of the Statute of the International Court of Justice (ICJ). Such progressive development of international law, especially with reference to international technology development and transfer which now has a precedent in the Law of the Sea Treaty,[480] has, historically, met with resistance from the traditionalist schools of international law.

In the past, technology exporting States have insisted, as absolute entitlements and preconditions for the 'effective' transfer of technology, on the need for recognition by host States of technology owners' rights - including the right to contract and trade freely, under guarantees of fair and equal treatment. Further, the law applicable to the settlement of foreign 'investment' disputes has been, historically, of concern to technology exporting States. These States have therefore called for the application of international law to freely negotiated contracts and the settlement of disputes.

Developing countries, especially those heavily dependent on technology imports, have historically, insisted on their sovereign rights. These include:

(a) The right of the recipient State to autonomously apply its laws to ensure, among others, that imported technology contributes to the development process;

(b) The right to invalidate or void contracts and/or agreements deemed restrictive, obstructive or aimed at frustrating effective technology transfer;

(c) The right to apply national laws to the settlement of disputes relating to technology transfer, according to, inter alia, the provisions of Article 2(c) of the Charter on Economic Rights and Duties of States (which provides for settlement of controversial questions of compensation to be settled under the law of the nationalising State) and the provisions relating to settlement of disputes as provided for, among others, under the International Centre for the Settlement of Investment Disputes Convention (ICSID) for example, under Article 42.[481]

5.1.1 Re - Statement of the Problem, Historical Perspective

Under unorganised international society (pre United Nations Era), international technology development and transfer did not form a separate or important subject and was subsumed under foreign direct investment. Sovereignty was a necessary precondition for direct foreign investment, with each metropolitan State largely investing in specific territories.[482] The law applicable to such investments was largely that of the home State and its industrial property legal regime was extra-territorially extended to control, inter alia, technological development in dependent territories.[483] Security of foreign investment was ensured

through 'extraterritorial' extension of guarantees and special advantages offered by the home State, largely under bilateral arrangements. [484]

Later, constitutional "guarantees" had to be given by newly independent States in relation to then current and future foreign investments. Such guarantees required the newly independent State to:

(i) Refrain from any actions calculated or likely to place non - nationals at a disadvantage compared with nationals;

(ii) Co-operate in the importation of any necessary machinery, equipment or materials;

(iii) Guarantee adequate compensation in any case of necessary taking of non - national's property (with varying standards, for example, fair, full and time limits for such compensation to be paid, for example, six months in the case of Uganda),[485] etc. The foreign investor did not primarily aim at building a technological capacity in the host State, but at application of extraction and exploitation techniques, especially in the mining and natural resources[486] sectors. As a consequence, the legal norms that developed during the period aimed primarily at the protection of sovereign States' nationals extraterritorial investments.

While rights of protection abounded, guarantees to mostly 'dependent' host States, were largely excluded. The imbalance between rights and duties of investors during the period is adequately reflected in the international concession regime and the unilateralist development of 'minimum' standards of treatment for aliens, and in the case of industrial property, the rigid exclusive protection of industrial property

owners' rights, for example, under the Paris (1883) and Berne (1886) Conventions.[487]

5.2 From Concession towards Balanced Contractual Entitlements: Investor Unilateralism and the Sleeping Partner Host State.

The concessionaire exploitation right and privileges were protected by the home State with regard to their equitable or justifiable nature.[488] The host State granted concessions in return for 'rate' or 'fixed, royalty collection [489] and it's sovereign rights were not extended to control over the resource development and exploitation activity of the foreign enterprise which were thus, at all stages, insulated de facto from host government control or interference.[490] Renegotiation of such concessions or divisibility of rights to ensure, interalia, transfer of technology, were alien to the concession regime.

Home country jurist and publicists insisted that whether as contracts or unilateral grants, concession provided a delicate, synallagmatic and interlocking set of rights and obligations that the grantor of the concession was under obligation not to upset in order to enable or allow the concessionaire to work the concession[491] . As late as 1958, it was still urged that the theory that government are not bound by concessions is calamitous for the free flow of capital.[492]

In short, in technology development and transfer terms, the host State had no control over the kind of equipment or machinery applied under the concession, research and development or adaptation of technology imports, training of nations.[493] Having granted the right to invest, the host State became a

sleeping partner, leaving it to the discretion of the foreign enterprise to determine when, what, where and which technology to introduce. The exclusive privileges granted under concessions and the largely non - participatory nature of the host State (whether as a source of legal regulation or as joint partner in technology development and transfer decision making), gave the concession and post - concession era's the single, indivisible or package contract, unilateral decision making and autonomous law regulation framework which have largely governed international technology development and transfers to date,[494] for instance, the technology development and transfer is largely ineffective and often implemented under innominate contracts, especially when the negotiating and performance gaps are large.

5.2.1 The Post-Concession regime, international development agreements, development corporations and the rise in demand for international technology transfer

The emergence of a large number of newly independent but technologically under developed States, especially during the post United Nations era, led to increased demand that "foreign investment" should not only result into use of physical resources in the host State, but also promote local technical knowledge and skills and dissemination of new organisational and operational modes. Further, it was demanded that the investor should no longer operate an enclave in the host State that responded to the legal, technical and *socioeconomic* demands of the home State.[495] Technology exporting States continued to stress the private and absolute nature of technology rights, as set out above. Where a recipient State exercised 'eminent domain' rights over any technology rights including the grant of compulsory

licences, the technology owner was entitled to prompt, adequate and effective compensation for the destruction or value reduction of his rights. This heightened conflict of interest inherent in the process of international technology flows[496] required quick resolution. Technology however, for some time continued to be expressed as part of and inseparable from the general investment regime, for instance, as not to be specified or subjected to separate authorisation, evaluation or approval requirements and procedures or other measures. Terms and conditions for exploitation of technology in the host State were largely unspecified, whether in investment agreements, development agreements etc., largely due to the need to establish pioneer industries in the host States.[497] Under these porous' national regimes, consisting of various, sometimes conflicting legislative controls and measures (for example, trade regulation policies - export and import controls, anti-trust laws, unfair trade practice regulation etc.), loopholes in regulation were widespread, with autonomous or unilateral private regulation remaining the primary mode of regulation,[498] enabling technology suppliers to subordinate host State legislative requirements to commercial practice and goals.

The *turnkey type* contract characterises the immediate post concession period. This was due to the fact that this type of contract enabled the supplier to provide a 'technological package' wholly under his control whole also superficially meeting national legislative or developmental requirements such as those relating to training of nationals and use of local raw materials. The main feature of a classic turnkey agreement as a technology development and transfer mechanism is the provision, by the supplier or technology owner, of embodied technology in the form of physical plant components. The supplier is responsible for the construction or setting up of

the plant, initiating its operation, testing its efficacy and adjusting any defects during a guarantee period. While other obligations may be incurred under the arrangement, for example, agreements as the to training of the purchasers' employees and future maintenance,[499] technology development and transfer does not form a primary factor under the package transaction. Technological motives are subordinated to commercial objectives as when suppliers rigidly adhere to observance of given technological specifications for any liability to arise against them. Even minor deviations from agreed terms may thus result in liability exemption for the supplier. Today, this mode of transaction in which technology development and transfer is only secondary, is still common among the least developed countries where the technical and commercial gap between the supplier is greatest.[500]

The introduction, among others, of *international development agreements,* especially those implemented through joint ventures with host country development corporations or agencies,[501] facilitated the adoption of more equitable forms of co-operation and enabled greater host State participation in international technology development and transfer, both at the level of recipient and as regulator.

Direct (sovereign autonomy based) regulation statutes appeared, especially in the 1960 - 1970's among the now advanced developing countries e. Brazil, Republic of Korea, Argentina or small industrialised countries such as Spain and Portugal, to condition the conversion of extractive capital investment ventures, equipment supply and maintenance, turnkey plant installation and other 'unilateral' or purely foreign owned ventures, into arrangements beneficial to the host State, such as joint ventures and industrial property licensing which would *inter alia*, allow greater use of local raw materials and increase local production for export, eliminate the use of any

practice deemed restrictive (general or specific), cause adaptation of technology, etc.

Such transformation was to be achieved through strict 'punitive' legislative provisions banning approval or registration of contracts containing Clauses or terms deemed as invading sovereign interests, for instance, sovereign 'authoritative' power was to be applied to eliminate activity deemed contrary to development goals. Substantively, the technology importing State tried to legislate against the 'negotiating and performance' gaps, for instance, to offset:

(i) Recipients relative lack of ability to draft technical documents, make commercial proposals, sustain complex technical and commercial negotiations and achieve specific negotiating objectives such adaptation, modification of technology, acceptance of local research and development obligations by the technology owner;

(ii) Recipient's deficiency of ability to design, manufacture or use specific processes etc. independently of supplier or owner of technology, especially in the least developed countries;

(iii) Recipient's inability to resist technology supplier's imposition of restrictions (gradually divided into general and specific) relating to entire contractual obligations, for example, ranging from restrictions on source of design modification or change of technology skills if not possessed by recipient, to post contractual obligations such as period of maintenance of technical or trade secrets or competition by recipient in given markets or generally;

(iv) Recipient's management, marketing, production, organisation etc. skill dependency on the supplier or owner of technology;

(v) Recipient's lack of technology assessment and evaluation skills, for instance, as to whether the technology is the most cost effective in terms of price, maintenance, hazard, etc.

All these objectives were to be implemented through strict application of approval and registration measures or criteria to technology development and transfer agreement. Contracts for transfer of technology were to indicate or show reason for purchase of technology, the *technoeconomic* results expected, commercial motives, developmental value etc., before approval.[502] however, as we shall see below, the failure of most direct regulation statutes to expressly link national measures to internationally agreed goals and objectives, created an image of unilateralism. The failure to link was largely due to the fore mentioned sovereign autonomy base of these statutes and their primary intention which was to encourage import substitution of capital goods and not technology itself.

Despite the shortcomings of direct regulation (mandatory) statutes, they were principally responsible for revealing the international legal problems posed by international technology development and transfer. Apart from initiating agreement to newer formal arrangements such as subcontracting, research and development agreements, management and marketing, joint assembly - production arrangements, technical licence agreements, production cooperation agreements etc., direct regulation statutes remained principally national instruments, which rejected provision for special regimes for non - nationals.[503] Naturally, suppliers of technology opposed the statutes on the grounds, inter alia, that they were,

substantively, unilateral and failed to provide even minimum guarantees to technology owners such as national treatment. States possessing direct regulation statutes countered such criticism by pointing out that the national treatment standard does not apply, in virtually all countries, to sensitive developmental issues and that special treatment for non nationals is justified only in terms of a felt pressing national need and not according to the source of technology or nationality of parties.[504]

Due to the national and authoritative character of direct regulation statutes, their rejection of applicability of international law or regulation to, *inter alia*, technology development and transfer agreements entered into or executed on the territory or within the jurisdiction of the legislating State, the lack of express linkage of national measures to agreed international measures, technology exporting States and private parties consistently opposed even the legitimate underlying principles contained in these statutes and denied the statutes had any international legal content. The principal non State agent of international technology development and transfer, for instance, the transnational corporation, while quickly ceding 'required' formal powers to the host State enterprises,[505] rejected or refused to accept 'joint' control over technological rights, perceived as private and absolute entitlements not open to host State ownership or 'redistribution' to other parties. While home country support could no longer be relied on to legitimate or justify practices that were obstructive or frustrating to the host State's efforts at technological import substitution,[506] the transnational corporation was still able to create the '*change of locks to fit the key*' phenomenon,[507] for instance, the imposition of terms by the supplier that oblige the recipient to adjust local conditions to meet the needs of the technology rather than *vice versa*.

Direct regulation was least effective in cases where the negotiating powers and technological position of the transferee were greatly divergent, for instance, in countries with the least institutional capability to formulate and implement laws and regulations or with the least technically competitive local enterprises and skills. In these latter countries, for instance, the least developed, many of which inherited uniform national laws and regulations[508] that stressed the private and absolute nature of technological rights, reinforced in bilateral treaties;[509] "unilateral implementation" as a pre - condition of effective technology development and transfer was presumed.

5.3 The solution - The Evolution of "Mixed" jurisdiction

The type of regulation that is evolving after the above outlined process, we refer to as mixed jurisdiction, for instance, national laws and regulations incorporating international norms, especially as minimum standards and general principles thus allowing for joint regulation of international technology development and transfer activity under municipal and international law. With relation to international technology development and transfer, the new mixed jurisdiction system requires;

(a) The recognition of existing international Conventions, Resolutions, Decisions etc., on the duty of all States to facilitate the transfer of technology among States as a precondition for enabling all States to gain access to advances in science and technology and eliminating gross material inequalities among them. Such recognition is based on the fact that technology is a permanent and complex reality in the development process;

(b) The extension of international law to, inter alia, the formulation, negotiation, performance, monitoring and follow up international technology development and transfer contracts. This entails, among others, acceptance by technology recipient and exporting countries that the body of authoritative rules of international law and its implementation extends to and encompasses the whole gamut of a State's institutions concerned with international technology development and transfer, for instance, legislators, the judiciary and administrators in a related process (thus, requiring national measures such as approval, evaluation, registration and validation requirements and procedures to conform to evolving international legal rules);

(c) The modification of the "circular" process of sovereign autonomy vis-a'-vis absolute private rights assertion, for instance, in a technologically more interdependent international community, recipient States must observe transparency requirements, ensure balance of commitments etc. and technology exporting States must in good faith, exert control over the technological rights of their nationals whenever international cooperation requires it;

(d) Recognition and respect for the fact that transfer of technology (*with technology as an appropriated, planned or regulated, confidentiality protected form of property*), requires voluntary participation by the owner or holder of the technology.

(e) The recognition and acceptance of the need to offer fair and favourable terms and conditions to LDC's (and special treatment to the least developed among them) seeking to import technology;

However, due to the complexity of the rights and obligations involved, the evolution of mixed jurisdiction has been tortuous. The slow pace change is due to assumptions that are made by each group as to what constitutes international law and how changes in international legal regulation are wrought[510] . Below, we set out some of the existing international or multilateral treaties or Conventions, Resolutions

and Declarations concerning international transfer of technological and scientific knowledge as part of the process of meeting the *socioeconomic* needs of developing countries. We thereafter show that the basic international legal content of these norms has become 'incorporated' through State practice, modifying national laws (for instance, that such national laws now more than reflect a minimum international legal content and show an implicit or de facto acceptance of international regulation over given issues).

The mixed jurisdiction rules which result from treaty based State practice have, being wide spread, become 'candidate rules' for international legal recognition. Such treatment of evolutionary rules as *de facto* binding, does not constitute, as seen by some critics an attempt to legitimate otherwise unilateral international rule making but serves to highlight the importance of such principles and the willingness of States to implement them and also provides reinforcement to the process of concluding international commitments.[511]

5.4 The organised international community and multilateral legal approaches to international technology transfer Issues

> "Although some norms can be conveniently traced back to a source, such as those created by a treaty, the establishment of a pedigree of norm often depends upon the logical closure of the legal system"

Friedrich Kratochwill, Thyrasmmachos Revisited, On the Relevance of Norms and the study of Law for International Relations, in international Library Essay in Law and Legal Theory, at p.53.

State practice under organised international law in necessarily characterised by the phenomenon of international institutionalised law[512] that involves the re-thinking of legal principles regarding sovereignty of States,[513] substantive and material equality between them, as those principles relating to non governmental actors in the international arena, etc. Further, organised international society, reflected in permanent international institutions and frameworks, has also required change in the nature of international communication and legal decision making among States.

Permanent international institutions and machinery have encouraged the growth of a dynamic and flexible corpus of negotiated norms and rules, fixed in the form of instruments such as resolutions, declarations, conventions or codes that are then adopted by the great majority of States. The United Nations system forms a large part of the new international permanent framework for international negotiation and legal rule making in pursuance of universal mandates based on the underlying principles of the Charter as expressed, inter alia, under Article 55 and 56.[514] Detailed discussion of the problem, as already outlined above, fro instance, the legal

relationship among others, between Article 38 (ICJ) and the Resolutions of the General Assembly, is likely to be unfruitful unless viewed from the context of the content of specific new norms.[515]

United Nations resolutions have been regarded as either contributing to the formation of international law through conventional sources[516] or taken as a body, providing an undoubtedly rich indication of source of evidence or indications of a general customary international law.[517] The degree of international legal authoritativeness of United Nations resolutions is often opposed by developed country "jurists" using criteria tinged with relative State status (for example, the expectations governing the extent of permissible behaviour, the extent and quality of consensus and the degree to which effective consensus is mobilised to implement the claims adopted in a resolution). Having discussed the matter elsewhere above,[518] here we only note that Mac Donald adequately summarises the debate when he states that:

> "whatever the most appropriate description of what is everywhere acknowledged to be a changing and complex situation, it is well known that the growth of (a) crystalline Charter through resolutions on the non use of force, on human rights, space and outer space, the use of the sea and the sea bed, and on environmental protection, to mention only a few examples, significantly affects the mixture of traditional international law".[519]

The United Nations forum and related agencies have been extensively relied on, especially by developing countries as technology importing and non - exporting States, to forge and structure a legal regime ensuring, among others, full reciprocity of benefit for all parties (for instance, balancing private rights and gain with public

or developmental interests), deduction of the effects of disparity in bargaining power, fair and favourable terms and conditions for access to technology by developing countries etc.

Many United Nations organs and agencies such as the United Nations Conference on Trade and Development (UNCTAD), World Intellectual property Organisation (WIPO), the United Nations Industrial Development Organisation (UNIDO), Food and agricultural Organisation (FAO), etc., have played a key role in the shaping, through multilateral framework treaty type institutions and arrangements, of various international resolutions, decisions and declarations into legal rule form, for example, as model laws and guide-lines[520] or models provide a guiding spirit and purpose for the formulation and elaboration of individual rules, which helps to explain the relative uniformity of otherwise recent laws, regulations and administrative requirements since the guide-lines, model laws or regulations encode and reflect the specific policy goals and principles agreed by member States of the organisation or their representatives.[521]

Early United Nations Resolutions, Declarations and Decisions did not deal directly with the subject of international technology development and transfer. However, emphasis was laid, in line with prevailing juridical and *socioeconomic* theory, on the need for accelerated flows of capital and technical assistance to developing countries[522] on basis of mutual advantage,[523] in accordance with Charter goals to remove obstacles to economic and social progress in developing countries.

Roughly, from the Second United Nations International Development strategy, the legal nature of the international technology process and the need for greater `overall reciprocity' of benefit was consistently raised. Thus, under General Assembly Resolution 2626 (XXV) it was agreed, inter alia, that developed and developing countries and competent international organizations would draw up a programme for promoting regulated international transfer of technology that would include:

(i) Review of international conventions on patents;

(ii)Identification and reduction of obstacles to the

transfer of technology to developing countries;

(iii)Facilitating access to patented and non - patented technology for developing countries on reasonable terms;

(iv)Facilitating the utilisation of technology transferred to developing countries in such a manner as to assist these countries in attaining their trade and development objectives;

(v)Development of technology suited to the productive structures of developing countries and measures to accelerate the development of indigenous technology,[524] etc.

The programme of Action on the Establishment of the New International Economic Order,[525] reaffirmed the need for both home and host States to facilitate the international technology development and transfer process, including the extension of international law to cover all international technology development and

transfer activity, through inter alia, the formulation of an international code on the Transfer of Technology.

Further, the programme called upon developed countries to give developing countries' access to modern technology on improved terms, promote acquisition of technological capacity in the recipient host States. The Programme also called for adaptation of commercial practices to recipient country needs to prevent abuse of rights by technology owners, through the imposition of obligations such as tied purchases, exclusive grand backs, prohibition of use of rival technologies, limitation of access to new improvements in the technology made by the transfer of or exclusion from ownership rights in technological improvements made in joint enterprises etc. Adaptation of commercial practices also implies reduced use or elimination of `obstructive' agreement forms, for example, indivisible contracts for supply or technology, as was common in foreign direct investment forms such as capital goods or equipment transfers, turnkey contracts and other traditional embodied technology development and transfer modes that did not primarily aim at technology transfer.

The Charter of Economic Rights Duties of States (1974) (CERDS)[526] states the need for all states to facilitate access for developing countries to the achievements of modern science and technology, including the transfer of technology and the creation of indigenous technology for the benefit of developing countries. Article 2 (2) (c) of Charter the provides that each State can nationalise, expropriate compensation, and in particular allows for the settlement of disputes regarding such

compensation under the domestic law of the nationalising State and by its tribunals. This provision, though commonly followed under most direct regulation statutes to subject all non national investors to exclusive host State jurisdiction, has been modified to allow for exhaustion of local remedies and application of international minimum legal standards rather.

Further, the declaration on the use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind (1975),[527] noting that scientific and technological progress has become one of the most important factors in the development of human society. The Declaration states that all States:

> "...*shall* promote international co-operation to ensure that the results of scientific and technological developments are used in the interests of strengthening international peace and security, freedom and independence, and also for the purpose of the economic and social development of peoples and the realisation of human rights and freedoms in accordance with the Charter of the United Nations"[528]

Further, it provides that all States shall:

> "...co-operate in the establishment, strengthening and development of the scientific and technological capacity of developing countries with a view to accelerating the realisation of the social and economic rights of the peoples of those countries". [529]

Similarly, the international development strategy for the Third United Nations Development Decade (1981) called on developed countries to take adequate specific measures to give or facilitate as appropriate, free and fullest possible access to technology. The strategy therefore recognised the need for improved legal regulation over international technology development and transfer flows. Such regulation would have to rely on new, universal and reciprocity based international minimum

legal standards, replacing any decaying international minimum legal standard, mainly in the Paris and Berne Conventions.

The Law of the Sea negotiations provides important precedent for the conversion of widespread principles contained in national laws into specific State or private subject oriented international legal concepts such as the concept of balance of rights and duties of parties, requirements for transparency,[530] fair and just treatment, etc. National measures are in specific cases made equally effective with international rules or standards, for example, with regard to pollution[531] health hazards, etc. With reference to "marine" technology transfer, the Convention sets out a requirement for preferential treatment for developing countries based primarily on the sovereign duty to co-operate[532] and need for balance of rights and duties. Such preferential treatment is qualified, that is, based on the capabilities of each member State to transfer marine technology.

Under United Nations Conference on Trade and Development (UNCTAD) Resolutions 39(iii) of 1972, 87(iv) of 1976 and 112(vi)of 1979, among others, the duties of a home State were set out as:

(i) Facilitation of efficient flows of market information;

(ii) Facilitation of technology development and transfer in aid packages and encouragement of enterprises[533] based on their respective territories to participate in the developmental activities of recipient States, including support for the technology import substitution programmes in the recipient countries by undertaking research and development in such countries, imparting technical skills etc.;

(iii) Facilitating the non - commercial transfer of technology in the public domain, especially to the least developed countries, that is, developed countries and competent international institutions should assist the institutions of the least developed countries in obtaining the results of scientific and technological development appropriate to their requirements, on favourable terms;

(iv) Encourage diversification of technology supplies, for example, through prevention of the formation of technology supplier concentrations among a few enterprises.

Under various Resolutions, for example, Resolution 31(vi) of 1985,[534] the United Nations Conference on Trade and Development (UNCTAD) has consistently called for the development and transfer of technology under the principles of universality, non-discrimination and respect for mutual advantage, as reflected, *inter alia* in the Draft Code of Conduct on the Transfer of Technology.[535]

Many other specialised agencies have passed resolutions or decisions dealing with transfer of technology, within their specific areas of competence. Thus the United Nations Industrial Development Organisation (UNIDO), which is charged with assisting in the industrial development of developing countries, through *inter alia*, the relocation of industrial production as envisaged in the Lima Declaration, has passed and implemented many resolutions and decisions on the subject of technology transfer. Thus, UNIDO Resolution 47 (XI) of June 1977 called for the strengthening of, among others, national, sub regional, regional and inter - regional technology centres for the transfer, development and practical application of industrial technology and proper selection, adaptation and evaluation of transferred

technology to ensure conformity to technical, economic, commercial and development implications.

The United Nations Conference on Science and Technology, Vienna (1979)[536] resulted in various resolutions on measures and mechanisms for the strengthening of the scientific and technological capacity of developing countries. The representative of the European Community called upon developing countries to adopt measures for the regulation and guidance of the of technology import activity, not only in respect of its direct transfer, but also with respect to technical assistance contracts, engineering services, investment and re-investment and other technology transactions.[537] Under Article 12 of the Resolution passed at the Conference, developing countries should, in accordance with their national policies and priorities, establish and strengthen national mechanisms for the assessment, transfer and acquisition and adaptation of foreign technologies. To achieve this purpose, developing countries would have to, *inter alia*, establish systems for compulsory registration of contracts and other technological transactions with foreign suppliers- Article 12 (g), establish an integrated system for the selection and assessment of technologies and for the development of a capacity to unpackage technologies to be acquired - Article 12 (b), promote the reorganisation of the national legal structures for the transfer of technology, including the revision where necessary, of the national legislation relating to industrial property, to promote domestic innovation - Article 12 (d) and promote the adaptation and assimilation of technologies and encourage increased utilisation of local inputs, particularly national resources and sub contracting. Further, developing countries were to establish, as appropriate, machinery to effectively monitor, screen and evaluate imported technology including that from transnational corporations, with a view to ensuring maximisation of

domestic technical inputs (reservation made by the European Economic Community States {EEC}).

Such machinery was to ensure, among others, that

(a) Transnational corporations do not impede but contribute to, the diffusion of technology in the host State;

(b) Subsidiaries carry out research and development in developing countries and associate in this process local personnel;

(c) Priority was given to the use of local raw materials, intermediate products, technology and personnel, etc.

At the conference, it was proposed by the United States that Article 13bis of the resolution should provide that national measures should be consistent with obligations under international law treaties, agreement be applied equitably and without discrimination, in accordance with fundamental fairness and established procedures of law. Further, national measures should be supported by a legal framework that promotes a favourable and beneficial climate for technology transfer, acquisition and development. The framework should encourage and facilitate transfer technology to take place under mutually agreed, fair and reasonable terms and conditions, and should give proper regard to existing rights and obligations of all parties concerned. In short, though disagreement existed about what the measure were to constitute, all States, technology importing and exporting, were in favour of national measures forming a part of the legal frame work for regulation of international technology development and transfer activity.

5.5 State Practice and the Crystallisation of a treaty based international legal regime for the regulation of international technology development and transfer

The tendency away from sovereign autonomy towards international law is reflected in the reduction or elimination of command structures and dictates. The use of law against legitimate entitlements diminishes with the growth of international legal rules to guide activity, promote collective self- interest and interacting goals. National measures become viewed as contributory to the process of crystallisation of international law given the absence of specific mandated international institutions to regulate the activity in question and its complexity which renders treaty making intractably difficult.[538]

The mixed jurisdiction regime, reflects the progressive crystallisation of an international legal regime for the regulation of international technology development and transfer in that the various 'new' or modified national technology development and transfer laws and regulations[539] are based on international agreements and consequently, are 'harmonised' or very similar in many respects, that is:

(i) Their scope of application extends mainly to international technology development and transfer contracts;

(ii) They aim at removing the negotiating and performance gap between suppliers and recipients by ensuring greater balance of commitments or their protection for all parties;

(iii) Their principal objective is to facilitate the recipient's acquisition of technological capacity within the framework of agreed or negotiated

international goals and policy objectives and under fair and favourable treatment;

(iv) The main legislation differentiates *primary development goals*, that is, in this case technology development and transfer from development related goals, for example, capitalisation of assets, repatriation of profits, purely financial or commercial provisions. National law is the law primarily applicable to primary goals, international law applying development related issues.

(v) The juridical and administrative framework of each State lays down broad guide-lines and bestows broad, discretionary powers upon regulating authorities (such as technology development and transfer centres or agencies), which lay down detailed rules and regulations and make individual adjustments on specific terms, in accordance with international law.

The foregoing factors are inherent in the various mixed jurisdiction measures, though their extraction as either principles or standards from individual legislative acts is not essential to their existence. The existence of the new international legal principles and standards is also unaffected by the fact that the scope of national laws on the subject of international technology development and transfer depends on the level of technological and *socioeconomic* development in each State.[540] Thus, while developed countries technology development and transfer laws deal with special *high - tech* requirements and joint research aspects,[541] and advanced developing countries (such as Brazil)[542] legal measures' centre on sector specific issues, with the aim of enhancing transfer and absorption of technology into those sectors perceived as technologically weak or as likely to contribute to the further acquisition of

technological capacity, the majority of developing countries measures aim at improving (or in case of the least developed countries, establishing), legal and institutional infrastructure necessary for the import substitution of technology;[543] the under lying international legal principles, policy and rules are conformed to and balance of commitments for all parties and achievement of favourable treatment for recipients is explicitly stated as a primary goal.

5.6 Mixed Jurisdiction : Meaning and Substantive results (principles and standards)

5.6.1 Mixed jurisdiction- Meaning

Because of the complexity of the international technology development and transfer activities of non - nationals in a host State, such activity has to be governed by intertwined international and municipal rules. Under such regulation, the application of general international legal principles, minimum standards and procedures acts as a floor or threshold level below which a host State, applying its national laws to the regulation of international activity must not fall. In practice, this means that national authorities dealing with any disagreement(s) relating to international development and transfer of technology transactions, actively involve the relevant multilateral institutions, taking advantage of the full range of established mechanisms and instruments for settlement of disputes (good offices, consultation, mediation, negotiation or even arbitration), short of adjudication, with the express purpose of maximising non litigational settlement of disputes and rule making. In the event of any actual litigation (which is rare due to the high efficacy of the multilateral

non adjudicatory process), the simultaneous application of municipal and all relevant multilaterally developed rules and procedures would be natural and in accordance with 'new' and current international practice of States to achieve balanced regulation of international development and transfer of technology activity. The nature and standard of treatment achieved under such balanced or Mixed jurisdiction is therefore substantively and procedurally different from that achieved under anti trust regulations or 'direct regulation' statutes,[544] since it relies on balanced standards and not 'auto determinism' or unilateral determination or enumeration of commitments and thus, entitlements.

Mixed jurisdiction also differs from the strictly nationalistic anti - trust and direct regulation statutes in a few but important respects. Firstly, mixed jurisdiction is flexible, reflecting the desire of States, at all levels of development, to establish legally balanced entitlements for parties involved in complex and highly dynamic international technology development and transfer activity and relationships with inherent conflict of interests.[545] Unlike direct regulation statutes or anti trust regulation which normally enumerate the rights of one State vis-à-vis those its nationals or non - nationals, Mixed jurisdiction ensures balance of commitments through guarantees of international minimum legal standards of treatment for technology owners and recipients and provision for fair and favourable treatment to developing country technology recipients according to their technical and *socioeconomic* needs. Under Mixed jurisdiction, functions such as registration or evaluation agreements do not only demand for exercise of good faith in the formulation, negotiation and performance of agreed obligations and rights, but also imply the acceptance of a duty to ensure balance of commitments by the recipient

State. These regulatory functions are increasingly taken, as stated above, with legally agreed or consensual participation by relevant multilateral agencies.

5.6.2 Balance of Commitments

The balance of commitments principle, as it has developed in State practice, means that overall rights and obligations are dynamically equal, legally determined and not imposed but negotiated. At the national level, it implies that implementation of national legislative or policy measures is subject to or conforms to some form of multilateral standard and that disputes are resolved in accordance with international law. The principle also implies a case by case approach, under which favourable treatment can be accorded to recipients in accordance with technological and *socioeconomic* needs in each State. Thus, specific 'restrictive' practices may be treated as permissible, where the recipient has a predominantly commercial motive (that is, where the recipient's intent is to dominate a market and not a technology[546] as when a recipient enterprise licences technology with a principle motive of acquiring commercial advantages such as the use of trademarks in local or export markets); or where the obligations are justifiable and *specifically defined*, for example, in relation to licensee's exports, right to sell improvements to third parties, contest validity of industrial property rights or acquire competing technology, carry on independent research, etc.

Balance of commitments and fair and favourable treatment, when constantly applied, prevent the perpetuation of material inequality that would otherwise result when the traditional principles of freedom of contract, non - discrimination, reciprocity, university and equality are *applied indifferently* to unequal parties,

that is, as under the traditional industrial and intellectual property conventions.[547] The acceptance of balance of commitments as modifying traditional principles and minimum standards, means in relation to international technology development and transfer:

(i) Cooperation and observance in good faith of certain duties by home and host States in addition to those of private or juridical parties involved in the technology development and transfer process;

(ii) Transparency of all laws and regulations applicable to transfer of technology;

(iii) Separation of primary development regulatory issues (to which national law may be exclusively applicable) from development related issues such as international technology related - trade and commerce, finance, etc., (regulated primarily under international law),

(iv) Accountability of all parties;

(v) Reasonable and non - discriminatory terms and conditions in the formulation, negotiation and performance of technology development and transfer agreements;

(vi) Fair and favourable treatment for all recipient parties;

(vii) Adequate and effective protection of legitimate interests of all parties;

Balance of commitments therefore, in practice implies, negotiation, performance and follow up of agreements in good faith, under reasonable and non - discriminatory terms and conditions. For the owner of technology, conclusion of

agreements should not result in unjust enrichment or giving of access to technology on a discriminatory basis (except under a few widely accepted and established legal departures from the general principle such as under the most favoured licensee Clauses).

5.6.3 Transparency requirements: Meaning and Relevancy

Mixed regulatory measures are taken in the light of the technological and negotiating power gaps. The initial approaches to improvement of negotiating and performance requirements of recipients, especially under the authority based direct regulation statutes, were primarily to restrict supplier powers. However, under Mixed jurisdiction, balance of commitments requires the exclusion of only general impositions that fundamentally frustrate the purpose of import substitution of transferred technology. Further, because it is often necessary for the recipient to get favourable, that is, preferential access to technology and technology supporting mechanisms such as trademarks, marketing, management and other devices; supplier co-operation "must" be guarantied.

Consequently, guarantee of transparency of the legal measures undertaken by the recipient State is a precondition for balanced legal relationships between supplier and recipient. The principle of transparency therefore requires a recipient State to publicly disclose and clarify all legal and administrative measures that affect the operations undertaken during the technology development and transfer process, especially with regard to exercise of the eminent domain, law applicable and dispute settlement.[548] Defined, transparency therefore means non - discriminatory and open

access and availability in correct form of the relevant rules and policies, to all parties. Such rules and policies should be in accordance with international law principles, rules and standards or policy regarding international transfer or use of, intellectual property (including industrial property), know-how, etc. Consequently, the recipient States should ensure transparency of all its laws and regulations with international law.

The necessity for transparency in national measures arises because such measures link international development law and policy, national development objectives and public and private commercial objectives. Further, through transparent measures compatible with international law and policy, private parties are made aware of internationally "agreements" and these are given the force of law. Transparent provisions are essential also because legal standards compliance is based on the assumption that parties subject to a rule know that behaviour is required of them in order to avoid excessive or under compliance, arbitrary assessment of claims or discriminatory enforcement, over regulation of given activities,[549] etc.

The foregoing is affirmed by an UNCTAD study which shows that legal provisions in national measures which are in accordance with international law and policy greatly influence private arrangements and facilitate the actual incorporation in technology development and transfer contracts of specific detailed requirements and the implementation of those requirements.[550] Thus, where the conventional autonomous contract provides generally that the supplier will be responsible for training of nationals, operation and maintenance of the supplied plant, the new

legislation encourages the supplier to train nationals in the application of all aspects of the (suppliers) current technology, for example, basic process design, detailed equipment design and procurement, construction, testing, start - up, operation and maintenance and improvement techniques, making it easier to legally monitor, quantify and determine the actual performance of the various rights and obligations under the contract.

5.6.4 Accountability

Traditionally, international technology development and transfer was characterised by unilateralism with observance of duties flowing mainly against the recipient. Accountability is aimed the limitation of such imbalances. Accountability is closely related to transparency since it arises and attaches when there is an intentional failure to meet transparency requirements by a private or State party. Thus at State level, accountability as a principle requires a home State, in accordance with international commitments[551] to exercise in good faith, effective control over its national enterprises (that is, those with head or principle office established on its territory) in order to facilitate developing countries legitimate import substitution of technology efforts and guarantee their right to benefit from advances in science and technology. Further, the principle requires such home State to prevent, *inter alia*, the export of polluting, hazardous or dangerous obsolete technologies.

The recipient State, on the other hand, should provide effective protection for legitimate interests of all parties, that is, those which do not obstruct the effective

'import substitution' of technology or acquisition of technological capacity. Such protection should be in accordance with reasonable international expectations based on the effective capacity of each State to comply with and meet its international obligations.

For private parties, the supplier of technology should be *per se* accountable for use of any coercive measures, for example, use of general tying Clauses, use of exclusion Clauses to avoid legitimate obligations such as giving warranties or guarantees, refusal to re-negotiate oppressive agreements and allow divisibility of rights and obligations, that is, the burden is on the supplier to prove such provisions are not restrictive. The supplier should *per se* be liable to compensate the recipient where obsolete, dangerous or polluting or hazardous technologies are supplied.[552] The recipient should *per se* be accountable for failure to maintain confidentiality with regard to rights under transfer, failure to make correct and prompt payment for technology, ensure adequate performance of his obligations under the agreement in accordance with reasonable expectations.

5.6.5 Fair and favourable treatment, (qualified special and preferential treatment)

As already stated, technology is today largely appropriated as private property. Fair and favourable treatment for all recipients, does not mean free access or special treatment for them but only requires full co-operation in good faith from all parties in accordance with their capabilities, to promote development and transfer of technology, on fair terms and conditions, taking into account specific conditions (for example, *technoeconomic* gaps between States, social and cultural factors,

negotiating power disparities, etc.). Thus the owner or supplier of technology should strike and appropriate balance between technological and commercial motives. The supplier or transferor should also adopt the most effective means and channel(s) for the transfer of technology. For the recipient, fair and favourable treatment means treatment that results in effective technology development and transfer or legitimate commercial activity and not unjust enrichment. In practice, it is accepted that in the case of the least developed countries, *special (preferential) treatment* is required if the recipient is to acquire a technological capacity.

5.7 The evolution of a mixed jurisdiction Regime illustrated two examples

The above attempts to outline the progressive formulation and articulation of international legal norms for the regulation of international technology development and transfer and the general effect of such formulation on State practice in the crystallisation of such norms. Below, we highlight some of the most visible specific effects of such progressive international law formulation on national regulatory arrangements for example in the modification of formerly 'strict' direct regulation statutes to streamline them with the evolving standards and legal expectations.

5.7.1 From absolute sovereign authority towards cooperation, Demise of general mandatory or direct regulation? The Andean Pact and Latin America example

In the Andean Pact countries the primary aim of the legislation for the regulation of technology imports we, initially, balance of payments considerations.

The local "production of technology, utility of know - how already existing in the sub - region, selection importation, adaptation and assimilation of foreign technology, etc., were secondary.[553] Emphasis on balance of payments interests meant that national industrial property systems were designed to ensure that imported technological rights were of foreign exchange earning value or capable of stimulating the creation of mass production capacities vis-a'-vis their more effective role in promotion of local innovation.[554] Consequently, national industrial property systems roles, for example, as innovation promotion tools and therefore technology development and transfer goals, were subordinated to immediate economic priorities. Because of this linkage to the general investment and financial regimes, legitimate provision under the joint technological policy that dealt with control of technology import and transfer were also regarded as contrary to international law, that is, as part of the absolute sovereignty based direct regulation status. However, as pointed out in chapter IV of this work, this presumption is largely inaccurate in relation to the substantive provisions of the joint technological policy which are largely in accordance with international law, as further shown below.

Under the joint technological policy, national industrial property offices concentrated their powers on evaluation and approval of all international contracts for technology development or transfer, for example, those for the licensing of industrial property. Foreign technology suppliers objected to mandatory examination, especially due to the Andean Pact member countries' insistence on the Calvo clause, that is, self determination for each state, including exclusive subjection of non - nationals to the juridical regime of the host State.[555] Evaluation was however in line with the "overall" national interests of all member States. The `overall;; reciprocity' between interests was

monitored and enforced through, interalia, the above mentioned programme for the promotion and safeguard of the production of sub - regional technology, adaptation and assimilation of existing technologies Article 23 of Decision 24.

In 1987, the Andean Commission passed decision 220, replacing Decision 24, the common Foreign Investment and Technology Licensing Code. In relation to international technology development and transfer, Decision 220 in effect separated the substantive basis of the Andean pact countries joint technological policy from the purely commercial, financial, trade, etc. aspects of technology imports (that is, development related aspects that as noted above, may include sale of technology, processes and financial aspects of technology development and transfer transactions such as royalty payments, repatriation of profits, etc.). This separation under modifying Decisions 220 and 291 of primary development issues, for example, trade, capital and commerce, is illustrative of the recognition in State practice that *national laws and regulations may apply exclusively only to primary development issues.*

The foregoing well illustrates by the Andean experience. Under Decision 24, host countries reserved the right to exclude technological investments from given sectors and "all" restrictive practices considered non legal. The `primary development' regulatory issues were then `fused' with commercial, financial or trade issues such as:

(i) Intangible technological contributions such as industrial models, technical assistance know - how could not form contributions to capital;

(ii) Local enterprises in the host State were to have free access to foreign technology, capital equipment, raw materials and working capital at normal international cost;

Decision 291 separates primary development regulatory issues and development related issues. Primary development issues such as public policy, impact of transferred technology, development of national technological capabilities, conditions affecting use of transferred technology, etc., then take precedence over issues such as adequate compensation for technology owners, capitalisation of technological property, repatriation of profits, etc. State practice now shows that the former are regulated strictly under national laws, while the latter are regulated under international minimum legal standards.

Thus, under Article 12 of Decision 291, the member States competent entity shall register and evaluate the effective contribution of imported technology, the transferor or technology owner has to comply with specific minimum legal obligations by inter alia, giving specific guarantees, making adequate disclosure of domicile and nationality,[556] contractual value of the technology to be transferred, the means of such transfer and make a separate evaluation of the elements involved in the technology transfer.[557] as well as the duration of the contract. The technology on a reciprocal basis - Article 14.

The decision then goes on to balance these duties by giving certain international legal guarantees to the technology owner, in relation to technology

related issues. Under Article 15, the technology owners right to payment for intangible technological contributions not forming contributions to capital or capitalise accrued royalties upon payment of prior taxes is recognised, even if such contributions form part of intra - firm transactions.[558] Given arrangements in technology development and transfer transactions may therefore not be regarded as restrictive if they do not conflict with primary national *socioeconomic* goals, etc. Further, in the Latin American region outside the Andean Pact, there are many other examples of the separation of primary development and development related issues, leading to direct acceptance of international minimum legal standards to regulate the latter. Examples of `modifying' legislation include the Argentina Technology Transfer Law (1981), Mexico's Technology Transfer regulations (1990) which modify the 1992 Law on the Control and Registration of technology transfers and use and exploitation of patents and Trade Marks, Venezuela's Decree 727 of 1990, modifying Decree 746 of 1975, etc.

5.7.2 From non - legal regulation towards minimum legal standards, the example of the Organisation for Economic Corporation and Development (OECD)

Ever without the law.....Never without friends

(Monopolies) Coke 3 Inst.182.

Traditionally, technology exporting states, that is, largely the industrialised countries. left international technology development and transfer flows to be governed voluntary non-legal `national good corporate behaviour standards' and autonomous law or agreement of the parties,[559] thus allowing technology owners,

through large numbers of patents or other exclusive intellectual property devices and arrangements. to control international technology development and transfer activity. This non-legal regulatory approach allowed the growth of international division of technology "markets'" that is, growth of concentrations, control over technology prices and rates of introduction of new technologies, transfer of obsolete, polluting, dangerous or potentially harmful industrial plants, processes and designs, etc. The technological relationship between parent companies and subsidiaries was particularly deemed outside legal intervention (that is, the receipt of technology packages from parent companies adapted exclusively on commercial grounds, was perceived as justified by the home State).[560]

Non - regulation over international technology development and transfer was further justified on the grounds of territorial jurisdiction and the non - compulsion of states to regulate, that is, it was claimed that direct imposition of regulatory requirements by the home state over extra - territorial activity would conflict with the host country's jurisdiction over, inter alia. environmental, health and safety matters.[561] However, the majority of technology exporting states opposed the CERD's requirement of exclusive application of host country legislation to technology transactions occurring within the host country's territory.

However, following the high rise in international technology flows, increased extra territorial effects of technologies, growing technological disparities between large and small industrialised countries, the rise of illegal international restrictive arrangements providing for inter alia, cross licensing and non - opposition of patents, joint prosecution of third parties or potential competitors. price fixing,[562] increased acceptance by developed

countries of the need to facilitate *primary development* in LDC's, etc., the majority of technology exporting state's practice indicates implicit movement towards multilateral legal controls of international technology development and transfer, including the curtailment of artificial or general restrictive practices.

Despite the above outline recognition of the problem within the special regime of the OECD, most or the organisation's members stress, (in a way identical to the circular `hard' and `soft' law debate) that what is accepted is `international ' minimum quasi - legal standards necessary for the general regulation of economic activity by global actors where it impacts for example, on taxation, health and environmental controls,[563] and not mandatory `imposed' national legislative requirements. The recognition of the need to preserve exclusive national regulation over primary development regulatory issues is therefore only reserved as applicable to OECD States.

Through the measures for the regulation of intra OECD technology development and transfer activity are labeled as quasi - legal and non binding, OECD countries have gradually moved from the former purely `moral obligation' standards such as good corporate behaviour towards distinctly legal `format' guidelines and standards. The OECD Declaration on International Investment and Multinational Enterprises (1976) to which the Guide-lines for Multinational Enterprises are annexed,[564] makes `recommendations' to transnational corporations that, though stated to be based on a pragmatic rather than a legal approach, create procedures which enable OECD institutions (the OECD Committee on International Investment and Multinational Enterprises - CIME) to apply the guide-lines as part of a consultation and clarification process, that is, as de facto minimum legal

standards aimed at achieving reciprocity of benefit by balancing national treatment with adequate *socioeconomic* responsibility by enterprises.

The recommendation's voluntary requirements are applied jointly with national laws. regulations and administrative practices in consistency with international law, especially the national treatment principle. Thus in practice, within the OECD special regime, the Guidelines. especially through an evolutionary review mechanism, have established de facto legal minimum multilateral standards in relation to transactional transparency, joint technological research, competition , taxation, employment and technological innovations.[565] etc., standards that are denied as containing legal content, even within the special regime. However, it can be concluded that OECD States now recognise and international legal duty to prevent enterprises based on their territory subverting primary development goals of other States, which in the case of developing countries involves technology development and transfer activity.

5.8 Extension of International Law - Impact of mixed jurisdiction principles on the technology development and transfer process, from assessment of needs, formulation of agreements, performance and follow up

5.8.1 Assessment

Successful import substitution of technology requires possession of a domestic capacity by the recipient State to assess the required technology. Traditionally, technology importing countries inadequately recognised or ignored the

fact that consequent benefits and obligations of the recipient parties and therefore the definition of entitlements, slows right from the negotiation and formulation stage. This stage determines the extent of effective acquisition of technology, assess to industrial property rights, secrets and goodwill and effectiveness of performance guarantees or warranties recipients may expect from suppliers, especially on hazardous technologies, the degree of divisibility of entitlements under the contract, nature of access to re-negotiation of terms and conditions, limitation of contractual obligation and prevention of use of coercive measures or general restrictive practices by the technology supplier,[566] etc. The divisibility of rights and obligations in technology development and transfer contracts is also determined at this stage because of the differing nature of transferred rights, that is, the transfer of technological skills is different in nature from licensing of bare patents or process(es) which also differs from simultaneous transfer of two or more rights. Due to the concentration of international technology transfer activity between developed countries (North transfers) the provision of pre contractual know-how and technical expertise (for example, in the feasibility studies, plans, diagrams, models, instructions, guides, formulae, engineering designs and specifications, including technical advisory and managerial personnel training) at the formulation stage of international technology transfer was left virtually to private party or autonomous law regulation, unless such transactions formed part of bilateral treaty based or multilateral technical cooperation agreements. One practical effect of non regulation under international law of the formulation stage was the above noted failure of commercial international technology transfer flows, (which in quantitative terms form the largest category of technology flows between developed and developing countries), promote effective acquisition of technological capacity

in developing recipient countries, especially when compared to far smaller international technical co-operation sources[567] that are subject to international or multilateral legal regulation.

The lack of international norms for the regulation of the formulation and negotiation stages of international technology development and transfer agreements has various effects on developing countries, including:

(a) The attempt to "*internationalise*" the entire technology development and transfer agreement by the supplier, especially in the law applicable to consequent rights and obligations and the counter use of direct regulation by host States for all aspects of the agreement;

(b) Experience of high degrees of 'unacceptable or non reciprocal terms and conditions' in agreements, including those submitted for registration [see Table A], especially in the least developed countries which have very weak institutional legal and *technoeconomic* structures.[568]

(c) Poor contractual negotiation or even frustration of technology development and transfer intent or purpose,[569] especially due to the inequality of bargaining and negotiating powers of the parties;

These effects are best illustrated from the experience of the least developed countries where bargaining and negotiating disparities between supplier and recipient are greatest. For instance in the countries of the South African Development Co-operation Council (SADCC), it was established that despite national legislative and policy requirements incorporating strong national legal 'incentive' treatment for foreign technology owners and the involvement of SADCC governments public enterprises in the major technology development and transfer contracts and arrangements, the majority of the production or service enterprises set up in the sub -

region, after due approval of the technology development and transfer contracts, are `turnkey' or imported equipment installment operations, that is, installment or final stage assembly plants.[570] In theses ventures, the imposition of general restriction of extent of the supplier, for example, in the form of `tied purchases', specification of extent of incorporation of local raw materials, suspension or elimination of recipient independent research and development efforts, use of high-tech solutions was often not subject to any international legal standard,[571] though the supplier preferred international law as the law applicable to the agreement.

From the foregoing, clearly, non legal regulation of the pre-contractual or formulation and negotiation stages of international technology development and obligation and transfer arrangements creates, *ab initio* a "continuing imbalance" in rights and obligations between supplier and recipient States have now adopted legal requirements for the formulation and definition of the "contractual basis" on which actual technology development and transfer is to be conducted and regulated be in accordance with sovereign or primary developmental, (technological) goals and other recognised international legal norms or practices. The new mixed jurisdiction requirements legally condemn or discourage, inter alia: "generally restrictive" or coercive arrangements whether made in bad faith or not, non re-negotiability and or re-formulation of agreements,[572] imposition of 'unwanted' technology packages on recipients, etc.

5.8.2 The Demise of Indivisible Arrangements fall of packaging

The divisibility or degree of unpackaging of technological rights and duties of the parties determines to a large extent and efficacy of the technology

development and transfer process. Where the supplier refuses to 'itemise' the technology supplied, the recipient is often deprived of necessary technological and related rights. Frequently, such refusal is justified by suppliers as necessary to protect their technological property, including confidentiality and not an arbitrary restriction of the recipient's acquisition of independent technological capacity, export potential or limitation of the competitiveness of such recipients' products.

Though each case should be judged on its merits, clearly, *indivisible* provisions that traverse both primary development and development related objects, are *per se,* restrictions amounting to illegitimate intervention in the recipient State's ability to execute its development programmes, import substitute technology or compete internationally thus perpetuating technological and material inequalities between States and are therefore unjustifiable. For the same reasons, as explained in Chapter 7, the Draft International Code on Transfer of Technology, provides under section 2 (c) for the unpackaging of technology and requires that the recipient retain freedom to acquire technological inputs from other sources.

In practice, package transactions often reflected the gap in the negotiating power and technological capacity of the recipient and supplier of technology. Though developing technology countries now, as stated above, waive package transactions involving non primary (technological) development objects, in the case of the least developed countries such waiver may disguise oppressive agreements cloaked in equitable names. This may be the case even if the technology development and transfer arrangement is concluded with a public enterprise.[573] Two examples of such "waivers" may suffice to highlight this point.

The first example is that of the 'joint venture' agreement between Valmet - Oy and Tanzania Tractors Manufacturing Company. Arguably, it was entered into before Tanzania passed her Investment Act of (1990)[574] which provides for a mixed jurisdiction structure providing for balanced benefit for all parties while requiring fair and favourable treatment for nationals.[575] The joint venture was concluded between Tanzania Tractors Manufacturing Co. (TRAMA) and Valmet - Oy of Finland in which the local public company held up to eighty per cent of shares. This 1980 joint venture agreement was concluded after the Tanzania government failed to get major international tractor firms to agree to invest in Tanzania (which had a strict direct regulation legislation regime viewed as arbitrary and contrary to international legal standards of protection for non national investors). Under the (TRAMA) Valmet - Oy joint venture agreement, the supplier was to transfer patents, trademarks, know how and technical assistance necessary for the manufacture of Valmet - Oy tractors.[576] Though the tractor had certain aspects that made it unsuitable for tropical use, such aspects, under the agreement, were to be notified to Valmet - Oy as licensor without the licensor being bound to follow the licensees' recommendations. The licensee was, *inter alia*, to grant back improvements over technology transferred on a royalty free, non exclusive basis, comply with quality and standard specifications, safeguard confidentiality, undertake not to transfer patent or technical information to third parties and all research and development was to be executed at the licensor's facility in Finland.

The second case is that of the waiver of an otherwise restrictive agreement by the Nigerian government. The waiver concerned a 'joint venture' agreement between a United States chemical transnational corporation and a Nigerian venture. The agreement, which involved the production of agricultural chemicals in Nigeria,[577]

though containing various restrictive practices, was consented to by the State government as conforming to the national interest. The agreement provided that the transnational corporation would provide manufacturing and product technology, technical assistance, top and part of middle management, in addition to control over production, financial, marketing, organisational management and policy formulation. The Nigerian nationals, though trained played no key role in operating the venture, though they would assume technical and managerial roles in the long term. Similar cases characterise transactions involving serious disparities in negotiating and bargaining powers,[578] when the recipient is often largely techno - economically dependent on the supplier.

It may be correctly inferred that *special preferential treatment and active co-operation from a home* State is necessary to achieve balanced entitlements for least developed country technology recipients. According to an UNCTAD assessment, widespread State practice through legislative and administrative measures dealing with the negotiation and pre-performance stages of international technology development and transfer agreements has had significant influence on the course and outcome of the negotiation process for the transfer of foreign technology[579] and therefore the outcome of technology import substitution strategies. In practice, the favourite method for enforcement of pre - performance and negotiation requirements is now the assessment of technology development and transfer agreements, before approval, to ensure that they were negotiated, formulated and guided by the principle of balanced entitlements, that they fully reflect the goal of effective technology transfer[580] and incorporate preferential treatment, whenever necessary.

5.9 The Performance stage

Traditionally, legal regulation, especially under the direct regulation statutes centred on controlling or "policing" technology development and transfer activity, *per unirversitatem*, away from the inherent conflict of interest between supplier and recipient (which is especially manifest during this stage), towards compliance with national development goals and objectives. Such national development goals, outside primary developmental interests, were not always in accordance with international law. However, under mixed jurisdiction which emphasises international co-operative or partnership behaviour,[581] the legal measures applied in the recipient State should, *inter alia*;

(a) Establish transparent rules and policies for the regulation of international technology transactions;

(b) Conform to ratified international intellectual property Conventions and other treaty requirements, if any;

(c) Provide balanced evaluation, review, approval and registration of international technology development and transfer agreements.

Primarily, the technology development and transfer contract should:

(1) Provide a possibility of balanced entitlements(s), that is, utility of technology to recipient, reasonableness of remuneration levels, protection of industrial property and stable and fair implementation of agreement - elimination of innominate or coercive contractual elements, including general restrictions;

(2) Comply with traditionally accepted 'public order' criteria, for example, protection of public health and safety by, *inter alia*,

ensuring non conveyance of hazardous technologies as well 'new' international issues such as environmental control;

(3) Assist the recipient State to import substitute technology by offering recipients technology on fair and favourable terms and conditions.

Performance of international technology development and transfer agreements is undertaken through various complex channels.[582] Detailed analysis of each of these channels is not necessary here. Rather, we indicate how the principles and minimum standards discussed above, especially balance of commitments, transparency and accountability, divisibility of rights and obligations (un-bundling or unpackaging in practice), fair and favourable treatment (or special treatment for the least developed countries), operate in practice to ensure that international development and transfer of technology conforms to development of scientific and technological capacities in all countries in the interests of international co-operation and interdependence.

5.10 Common or widespread legal provisions in National and Regional Measures for the Regulation of Performance and Follow up of Technology development and transfer Agreements

It is not necessary to enumerate all common legal provisions and measures, (reflecting or based on international agreements) in widespread usage nationally, bilaterally or regionally for the regulation of international technology development and transfer transaction. However, citation of a few of such provisions may serve to illustrate our arguments above, that is, the emergence of specific principles of a legal nature that are regarded as binding or highly persuasive by States and or parties

to international technology development and transfer. The principles discussed include of balance of commitments. transparency and accountability, divisibility of rights and obligations, and the fair and favourable treatment standard, among others. In the next section below, we highlight some of the important provisions now widely accepted in State practice relating to international technology development and transfer.

5.10.1 Duties primarily to the Recipient, examples.[583]

Unpackaging and itemisation (that is, divisibility of contracts)

(i) Upon request of the potential acquiring party, the potential supplying party should, to the extent practicable, make adequate arrangements as regards unpackaging in terms of information concerning the various elements of the technology to be transferred, such as is necessary for technical, institutional and financial evaluation of the potential supplying party's offer;

(ii) Parties specify the compensation agreed upon for each item agreed upon or covered by the transaction;

(iii) Parties specify nature of decision making in technology development and transfer ventures and provision for possible re-negotiation of terms and conditions;

(iv) Provision be made for different sourcing, whenever necessary, of technical;

(v) Know-how, technical assistance, components of raw materials, patent licences, trademarks, industrial technology etc. Should be availed, if necessary from `third party' sources;

5.10.1.1 Most Favoured Licensee and Non - Discrimination Clauses

(i) Supplying party to furnish all relevant information helping potential recipient to determine whether it is discriminated against or not;

(ii) The terms and conditions, including price or consideration charged, to be non - discriminatory and in accordance with recognised professional, technical or service charges;

(iii) Supplier to be offered same treatment as all other 'competitive' suppliers;

5.10.1.2 Description of the technology

(i) Agreement shall or should contain a detailed description of the technology made in balance of commitments;

(ii) Technology should meet the description contained in the agreement and should be correct and complete for the purposes of the agreement and up to date at the time of transmission;

5.10.1.3 Validity and ownership of industrial property involved

(i) Warranty that potential supplier owns industrial property rights to be transferred or is otherwise entitled to transfer the industrial property rights involved;

(ii) Supplier make and render a valid and correct list of titles of industrial property involved in the agreement;

5.10.1.4 Suitability for use

(i) Correct and transparent specification of the purposes of the transaction;

(ii) Guarantee that the supplied technology will meet agreed legal and technical standards and needs for the purposes it is supplied, and be in accordance with established and accepted professional standards and specifications;

5.10.1.5 Confidentiality

(i) Recipient to keep technical know - how confidential and use it only for its own production;

(ii) Transfer of rights and obligations to be undertaken only after consultation with supplier and on agreed and correct terms and/or conditions - restrictions to end after performance and expiry of rights and obligations;

5.10.1.6 Training of personnel

(i) Shall include, whenever possible, comprehensive, appropriate, well-defined personnel training and development programmes for nationals of the recipient State.

5.10.1.7 Provision of components and spare parts

(i) Provision for supplies of components, spares and services associated with technology to be guarantied, at the request of the recipient or according to internationally recognised or established professional standards;

(ii) Delivery to be in a prompt and orderly manner;

5.10.1.8 Use of local resources and personnel

(i) Supplier to take into account and agree to make correct use whenever available or identified of local materials, technologies, technical skills, consultancy and engineering services and other resources;

5.10.1.9 Performance guarantees

(i) Specification of technical and professional performance standards, agreed and expected supplier and recipient's standards of skill, care, method and level of expertise;

(ii) Assurance of efficiency and maintainability of the technology to be supplied;

(iii) Supplier disclose risks that may result from utilisation of technology supplied, (especially in relation to health and environment);

5.10.1.10 Form and calculation of payment

(i) As provided for and determined under national law, in conformity with accepted multilateral or international legal standards, procedures or rules.

5.10.1.11 Restrictive practices

(i) Agreements for transfer of technology not to contain a universally condemned restrictive business practice or general provision that freezes, eliminates or obstructs recipients rights or imposes non - reciprocal obligations;

(ii) Supplier shall not negotiate for or demand for restriction of recipient's present or future competitive ability with regard to relevant supplied or improved upon technology or know - how;

(iii) Supplier shall not obstruct the acquisition of technological capacity by recipient;

5.10.1.12 Exceptions

(i) The relevant evaluating or approving authorities may allow parties to undertake specific obligations or rights, for example, to remedy market failure, increase efficiency of natural monopolies, safeguard the national interest or reduce administrative burdens imposed on parties.

5.10.2 Duties primarily to the Supplier, some examples

5.11.2.1 Performance guarantees

(i) Specification of technical and professional performance standards, agreed and expected supplier and recipient's standards of skill, care, method and level of expertise;

5.10.2.2 Quality standards

(i) Recipient to observe and maintain agreed quality standards and/or levels except those which are contrary to the public interest of the host State or

constitute abuse, damage, prevention or hindrance to the technological development or entrepreneurial freedom of the recipient;

5.10.2.3 Pricing obligations

(i) Level of pricing: should be fair and reasonable, having regard to nature of technology, value to the national economy and overall contribution to acquisition of technological capacity and reciprocal benefit by recipient;

or

(ii) As evaluated by third party and agreed upon by parties;

(iii) Recipient to observe and maintain agreed quality standards and/or levels except those which are contrary to the public interest of the host State or constitute abuse, damage, prevention or hindrance to the technological development or entrepreneurial freedom of the recipient;

(iv) Adequate and effective protection of any rights under transfer or as agreed to be necessary;

5.10.3 Dual Rights, that is, for Supplier and Recipient

5.10.3.1 Form and language of the Agreement

(i) All transfer of technology transactions should or shall be in the form of a written contract;

(ii) The text of the contract to be in the language of both the supplier's and acquirer's country;

5.10.3.2 Duration of arrangements

(i) Prohibition of unduly long duration for transfer of technology arrangements, in accordance with internationally recognised standards;

(ii) Extension of expired agreements to considered in cases of national interest, that is, where extension would promote recipient's acquisition of technological capacity or where new improvements are likely to occur especially in joint ventures.

5.10.4 Choice of Law and Forum

Determined primarily by consideration of whether issue falls into the primary (technological) development or development related area. National law (sovereign right) is the law of first instance in the former case. International law norms primarily apply in the latter case, that is, to be valid, national measures dealing with commercial, financial or trade (technology development related aspects) of the technology development and transfer agreement, should be in accordance with international law. Therefore:

(i) Disputes between parties to be settled through use of conciliation, arbitration and other judicial procedures, in conformity with national law and minimum international legal standards;

(ii) Judicial recognition and enforcement of awards validly rendered in the host State by an international tribunal applying relevant national legislation and recognised or agreed minimum standards of international law;

5.11 Summary and Conclusion

The above cited provisions provide backing for the our main discussion and show that the general principle of *balance of commitments* now underlies most of or all of the provisions that have evolved during the era of organised international law. The principles and standards of *transparency, accountability, preferential treatment, divisibility*, etc., discernibly modify of enhance the traditional principles of freedom of contract, *caveat emptor*, reciprocity, national treatment, non discrimination, or the prompt, adequate and effective compensation standards, etc., as applied to international technology development and transfer contracts, thereby helping to ensure gradual evolution towards extension of international law to the entire technology development and transfer process through:

(a) Separation of primary (technology) development goals from development (technology) related ones resulting in greater balance of entitlements or legally defined benefits for recipients, for example, through more effective technology development and transfer due to improved access (terms and conditions, including lower techno-economic costs), greater transparency of agreement terms and conditions etc., and for suppliers, a clearer transactional environment due to improved transparency and greater compatibility with international law of the "Mixed jurisdiction" regimes;

(b) Freer and wider choices for recipients as to supplier, type of technology required etc., due to elimination of indivisible or package arrangements;

(c) Formulation of equitable arrangements that take into account negotiating and bargaining gaps by offering technology on unconditional fair and favourable terms to recipients and for the least developed countries, due to their lack the *technoeconomic* resources to take advantage of fair and favourable terms, offer of *special preferential* terms.[584]

Finally, the foregoing discussion goes towards proving that balance of commitments, transparency, accountability, divisibility, fair and favourable or special treatment, are, among others, more than candidate rules for future legal recognition, that is, they already form quasi - legal norms and rules which are widely recognised as binding in practice.

CHAPTER SIX

Trade and Technology - Triumph of International Commerce and "Managed Trade" over Primary Development, Balance of Commitments and State Interdependence?

The World Intellectual Property Organisation system, it has been recently alleged by developed countries, provides an inadequate system of protection and enforcement mechanisms, that is, a level of enforcement and protection, especially for new rights, which is below that necessary to meet current and future developments in intellectual property. These claims are contrary to our conclusions in Chapter II and the ongoing attempts to revise the major multilateral intellectual property Conventions to mitigate the effects of exclusive private rights on the primary (especially technological) development interests of developing countries .

Though protection of intellectual property rights under the multilateral Conventions is already meticulously and comprehensively defined,[585] *developed countries (which include those which most evade GATT disciplines), have moved the issue of protection and enforcement of 'trade related' intellectual property rights, from the proper forum of WIPO to that of GATT because the former forum seeks more actively to protect balance between private entitlements (legal rights) and those of private consumers of protected rights and technology import dependent states, that is, the organisation seeks, inter alia, to maintain and improve:*

(a)Differential and favourable treatment for developing countries seeking access to knowledge (including state of the art knowledge) and special treatment for the least developed among them;

(b) The international transmission and diffusion of knowledge and the preservation of independent and unrestricted development and exploitation of ideas;

(c) The right of each country, in accordance with its primary development needs, to determine the subject and level of protection for intellectual property rights, without material reciprocity;

(d) Gradual reduction of the technoeconomic cost of "import substituting" technology for developing countries;

(e) Balance of private rights interests with public interests, through, inter alia, control over abuse of intellectual property rights by owners and improved transparency of host State juridical and administrative regimes to ensure compatibility with international law, etc.

Below, we show, in relation to international technology transfer, that the inclusion of "metamorphosed" intellectual property rights (herein after TRIP'S), that is, as trade-based rights or measures, within the GATT framework, is highly objectionable to developing countries because, inter alia:

(i) Inclusion of TRIP's into a North-South Trade system which is based mainly on national treatment and material reciprocity (offering only conditional preferential treatment to LDC's in their international trade relations) us likely to upset the balance between private rights and the public interests of states seeking to import substitute technology, thus negating attempts (such as the revision efforts undertaken under WIPO) to control abuses during the production and dissemination of new works and inventions, thus ultimately increasing the technological and material inequalities between states;[586]

(ii) Just as it is important to protect and maintain the incentive to innovate, it is equally important to guarantee the right to independent origination and exploitation of ideas, that is, no one should be protected `universally' from the independent origination of ideas. The GATT - TRIP's proposals, by eliminating territoriality and emphasising the exclusivity of the economic rights of IPR holders, will create absolute protection for ideas and expressions' that is, a `universal first past the post' system of inventing, registering and exploiting ideas. Such a system would automatically favour the technologically most advanced states, and thus increase the cost of importing technology for developing countries and frustrate their efforts to achieve technological capacity through international technology development and transfer.

(iii) The reforms will impose a "reverse burden of proof" on developing countries, especially the most advanced, to show need for

differential and favourable treatment in transfer of technology and technical assistance issues, contrary to already established international legal norms;

(iv) Since basic questions about intellectual property protection for information technologies such as computer software, are still basically unanswered.[587] *(for example, what to protect, how much to protect, duration of protection, against what, extra) and since only a novelty and not - obviousness or the copyright test for originality-),*[588] *to accord such property universal protection is unjustified:*

(v) The near unilateral (international) and exclusive (private) ownership of IPR's.[589] *by development needs of LDC's by private IPR owners, renders GATT theories of fair and free trade inapplicable to North - South "trade and exchange" in IPR's.*

6.0 Metamorphosis of IPR's into Trade Issues and Measures, impact on Developing Countries Technology Development and Transfer Policies and Practice

"...low level protection results in general leakage of technology that could have been prevented under high level protection. ...There is no basis for such a theory as long as we stick to general principles of intellectual property law according to which competition outside the claim of a patent is lawful as is the experimental use of a patented invention"

GATT or WIPO, New Ways in the International Protection of Intellectual Property, Friedrich - Karl Beier and Gerhard Schricker (editors) Max Planck Institute 1989.

6.1 The Movement to GATT; WIPO, a failing or obstructed forum for the international regulation of IPR's ?

The WIPO, is a framework organisation which addresses sovereign member states as partners of international intellectual property agreements. It is responsible for the administration of the two major intellectual property Conventions, that is, the Paris and Berne Conventions. The Conventions ascribe to nationals of member states certain rights (in intangibles) and the conditions for their ownership and exploitation, thus entitling those nationals to raise claims and invoke Convention rights based on certain *minimum rights and standards.* These minimum standards are sanctioned primarily by private litigation and only as a last resort is recourse made to retaliatory means of international law.

6.1.1 Movement towards GATT - A Renewal of Economic Rights Protection ?

The protection of IPR's has become an increasing pre-occupation for major technology owning states. This renewal of interest is primarily due to the fact that the development of new technology, that is, technological innovation, is increasingly regarded as the basis of economic development. Consequently, it has become the common practice of states, especially the highly industrialised, to heavily subsidise technological innovation.[590] These subsidies are the direct result of the triumph of the argument that incentives are a precondition to innovative activity over the traditional arguments advanced against the need for incentives.[591]

Developed countries, after subsidising the "production" of private intellectual property rights, are now taking steps to ensure extra-territorial protection of the exploitation of such rights. These steps are not aimed at resolving primary (technological) developmental needs in developing countries and it is denied that heavy subsidisation (as incentive) of technological innovation in developed countries has an important bearing on the question of domestic technological innovation in developing countries,[592] international technology transfer terms and conditions, international trade and ultimately, maintenance of sovereign independence by developing countries.

6.1.2 Movement towards GATT & The Issue of Enforcement under WIPO; WIPO enforcement of IPR's inadequate or unsuitable ?

The issue of inadequate enforcement under the WIPO administered conventions, raised by developed countries largely in response to their 'industry

demands'[593] is largely groundless in strict legal terms. Under the Paris Convention, a member State which fails to carry out its obligations under the Convention commits a wrongful act, thereby entitling an aggrieved member State to take appropriate counter measures, that is, to the extent necessary to correct the effects of the wrongful act. These counter measures may include retorsion whereby the aggrieved State limits its sanctions to merely unfriendly acts or resort to reprisals and retort against the breach of the convention's obligations with acts which would otherwise be illegal.[594] The Berne Convention, implicitly provides for authors to enforce their rights, though such rights, due to the territorial nature of the convention (and therefore copyrights), are not spelled out. These enforcement mechanisms have been sufficiently efficient to ensure continued protection of industrial property rights of non - nationals even in countries which perceived the Paris Convention system as unresponsive to their interests.

6.2 WIPO and Balance of Commitments: developing countries *technoeconomic* needs vis -a- vis technology rights owners interests

The WIPO administered intellectual property protection (IPP) convention system aims at achieving balanced interaction between national laws aimed at the regulation of conditions for use of granted IPR's[595] and the international collective interest in maximising, through international law, gains from innovative and inventive activity . To achieve this goal, WIPO has promoted a "progressive harmonisation"[596] approach.

WIPO, as a specialised agency of the United Nations.[597] has duties which transcend mere administration, unlike its fore runner the Bureaux Internationaux Reunis pour la Protection de la Propiete Intellectuelle (BIRPI). The organisation's duties, set in accordance with its nature as a framework organisation charged with promotion of protection of IPR's at the global level (through, inter alia, co-operation among member states), also include the duty of WIPO as a permanent legal - technical programme for the acquisition by developing countries of technology related to industrial property.[598] (for instance under its permanent Committee for Development Co-operation related to industrial proterty).[599] The services offered to developing countries under WIPO include:

(a) Support in preparation of their intellectual property laws and regulations, to ensure inter alis, compatibility with multilateral legal regimes, including WIPO administered Conventions;

(b) Support for human resources development in the field of intellectual property, for example, through the training of their national and strengthening of national and regional institutions and organisations and other measures in the field intellectual property;

(c) Support in legal and technical matters such as automatic information systems, patent documentasion services, search system development in Patent and Trademark offices, extra.

Such support primarily aims at gauranteeing eventul techbological parity among all states, by enhancing the abilities of developing countries to negotiate for, select, apply and develop imported technology and effectively defend them against the effect of increased international privatisation of technological ownership.

WIPO duties to assist developing countries have delicately coexisted with others such as the clarification of questions arising from new technological developments, facilitating the establishment of a global intellectual property regulatory system that is as uniform possible[600] (for example, in the area of elimination of formalities as a condition of protection)[601] and maintenance of adequate protection for intellectual property rights, especially through balance of private and public rights. This last objective, that is, that protection of rights cannot be *without limit or in perpetuity* but with due regard to the interests of the consuming public and the *technoeconomic* goals of all states, whether developing or developed,[602] is regarded by technology owning states as contrary to promotion of intellectual property rights production and international "free and fair" trade in or exchange of such rights. It is for this reason that developed countries have sought to metamorphose intellectual property rights into a "free trade" issue.

The 'effective' metamorphosis of IPR's into a trade "measures" issue, especially in its enforcement aspects may:

(i) Impose an international trade re-interpretation of multilateral intellectual property principles and norms for example, the recognition of the law of the granting State as naturally governing substantive rights, terms, remedies and ownership or transfer issues that arise expressly out of the territorial sovereign grant,[603] a position accepted by many developed country jurists and scholars in the field of intellectual property rights;[604]

(ii) Promote developed country industrial interests according to which, the GATT initiative, though not constituting a miracle cure, is important in that it

Provides a broad negotiating context under which package deals can be reached, thus creatin a situation of leverage "totally" lacking within a WIPO negotiating framework.[605] This approach has an underlying rationale to the effect that the new GATT trade concessions, market access, extra, should in practice replace WIPO enforcemtnt measures which are based on proportionality, non - coerciveness and unanimity with a leverage enforcement system.

From the foregoing, it already clear that a GATT Trip's regime would not be primarily concerned with elimination of technological disparities between states, that is, by promoting developing countries' acquisition of technology development and transfer, but with weakening or elimiting developing countries "territorial" balance of intellectual properth rights interests with the public interest.

6.3 The GATT, Traditional Principles of relevancy to the international regulation or IPR's and the possible impact of a new GATT - TRIP's regime on international technology transfer flows

The GATT has hitherto overseen a common set of rules and procedurs for international trade in goods. Though unratiried and therefore strictly not in force as an international agreement, the agreement has a legally hinding character, deriving from various protocols,.[606] on its members. The scope of application of the GATT is vast, since the agreement is applied under an extensive number of annexes, schedules, tariff concessions, side agreement amendments and unratified

amendments, etc.[607] It is noted in passing that this vastness of possible trade and trade related applications (including enforcement) of the agreement constitutes a primary reason why developed countries, have shifted IPR's towards GATT. Further, GATT is a very appropriate forum for countries wishing to conclude new individual and supplementary arrangements with special rules (such as may be concluded by developed countries with newly industrialised countries)

Detailed analysis of the GATT Agreement is not necessary for our current purposes since it would entail repetition of issues and principles discussed in Chapter ii of this work. However, it may be useful to note some of the principal objectives technology by developing countries. These may include:

6.3 (a) Most Favoured Nation Treatment (MFN)

The main general principle of the GATT agreement is conditional most favoured nation treatment (MFN) - Article 1(1).[608] Under the MFN principle, GATT contracting parties are required, in their external trade policies (abroad), to offer the same treatment to imports from all third countries without discrimination, for example, with respect to customs duties and other charges. The main theoretical function of MFN is to ensure that `resource allocation' on the basis of `comparative advantage' is not distorted in favour of some member states, that is, an approach that compares the totality of benefits received with concessions made. International technology development and transfer requires balance of commitments whereas current international trade in technological goods and processes, as discussed below, is characterised by a *perpetual tendency towards unilateral flow of benefits which the principle of MFN does not mitigate.*

6.3 (b) The Principle of National Treatment

The principle of national treatment requires member states to offer equal treatment for foreign and domestic products with respect to internal taxation and regulations. Below, we show that the likely full and rigorous application of this principle, due to the recognised non observance of GATT part IV provisions[609] (the provisions being implemented optionally or discretionary by the granting State) [610] would obstruct or eliminate LDC local technological development and research potential.

6.3 (c) Reciprocity in GATT

Reciprocity, has been argued to be a 'corner' stone principle of the GATT. Today, international trade in industrial property rights is under taken in a global environment of states with grossly unequal economic strength, differing levels of development and *socioeconomic* systems as well as the largely unilateral ownership of technology by developed countries. The combined effect of these conditions makes the application of material or abstract reciprocity to breed increased inequality.

6.3 (d) Transparency

Another major principle is that of *transparency* - Article X of GATT. For our purposes, transparency is defined as predictability, stability and public availability of laws, regulations, judicial decisions and administrative rulings of general application affecting owners of technological rights.[611] The principle requires that government regulations affecting both internal and external trade (in IPR's in this

case) should be open and public so that every party affected by them will know what rules exist. The principle, with regard to intellectual property (in GATT) would in effect demand that provision should be made for adequate standards and principles concerning the availability, scope and use and trade in intellectual property rights.

While strict observance of transparency requirements is desirable and legitimate,[612] in practice, the introduction of a GATT - TRIP's regime incorporating transparency, could expose LDC governments taking and effecting *technoeconomic* and related decisions, to speculative private party actions by intellectual property owners in addition to 'unfair trade actions' instituted by home states of such IP owners. On the other hand, private IPR's and practices are by their very nature not amenable to regulation under transparency requirements, that is, since they are not internationally 'registered'.[613] Consequently, the GATT - TRIP 's provisions would impose a further constraint on developing countries sovereign ability to control technological activity on their territory or within their jurisdiction, since GATT retaliatory measures could be taken against them by a technology exporting State on "trade based" grounds.

6.3 (e) The GATT dispute settlement measures

The GATT dispute settlement mechanism[614] provides the major basis for developed countries 'forum transfer' initiatives for IPR's. Though in principle seeking to improve the system's enforcement measures, developed countries in practice have sought to institutionalise measures that otherwise would have had to be instituted unilaterally against parties allegedly violating IPR's. The United States has led this institutionalisation proceeding after the majority of states objected to its unilateral 'unfair trade' actions under the amended Trade and Tariff Act,[615] which

introduced an international reciprocity requirement with regard to intellectual property protection, that is, the Act requires that intellectual property protection be considered in awarding benefits under the United States Generalised System of Preferences (GSP).

The GATT dispute settlement system whose procedure is set out in Article XXIII, in principle encourages members, before asking for panels, to first try to reach mutually satisfactory solutions to disputes through bilateral or plurilateral consultations, that is, it offers a dual opportunity to a country wishing to protect its commercial and trade interests to achieve its aims. Developed country intervention to ensure 'required' extra-territorial treatment for their nationals intellectual property rights would be possible because GATT bases its dispute settlement procedures on the concept of nullification or impairment of any benefit the complaining country might expect under the agreement,[616] Article XXIII that is, if any contracting party should consider any benefit accruing to it directly or indirectly under the Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:

> (1) The failure of another contracting party to carry out its obligations under this Agreement, or
>
> (2) The application by another contracting party of a measure(s), whether or not it conflicts with the provisions of the Agreement, or
>
> (3) The existence of any situation...;

it can institute dispute settlement proceedings against the exporting country. Consequently, an invaluable opportunity for linking importing countries trade

measures to IP 'violation' or technology policy 'distortion' in exporting countries is offered under the dispute settlement mechanism.

The GATT - TRIP's *enforcement mechanism would be based on domestic enforcement of the new norms.* The burden of proof would remain with an alleged infringer, with remedies including injunctive relief, damages, seizure and destruction of infringing goods. Such provisions, coupled with product patents and developed country use of *trade concessions or market access conditionalities*, would effectively protect developed country IP owners against potential competition from developing countries' innovators and manufacturers, thus perpetuating developing countries role as technological goods importers.

Though developing countries, as discussed below, have pointed out, *inter alia*, that the application of GATT sanctions to a violation of IPR's would call for difficult financial calculations to assess the economic importance of a given treaty violation, for example, the difficulty of assessing the 'economic value' of insufficient protection standards, and that GATT responses to IPR's violations would have to be specific, that is, intellectual property related,[617] these arguments are gradually being eliminated from negotiation under developed country pressure.

6.4 GATT, the appropriate forum?

Hitherto, GATT arrangements have almost exclusively centred on liberalisation of trade and commerce in *goods*, that is, progressive elimination of barriers, tariff and non tariff, on the basis of reciprocal and mutually advantageous concessions and not protection of 'intangible' private property rights. Previous GATT attempts to formulate and conclude a Counterfeiting and Piracy Code proved

abortive.[618] The current GATT - IPR related provisions contained in the agreement, (in accordance with the international law requirement that GATT perform functions for which it was established), are skeletal,[619] for example under Articles I, III, IX, X, XX, XXI and XXIII.

Because of the strong emphasis on unconditional most favoured nation treatment, transparency and reciprocity in the GATT, developed countries, as detailed below, have found the Agreement a convenient forum to extend `weighted control' over the formerly `residual' trade in invisibles, that is, control over international trade involving contracts for processing, maintenance or repair, intellectual property, tourism, air and land transport, insurance and banking etc. Charges of premature rule making are rejected by developed countries despite the fact that even in these countries, the legal scope for protection of certain IPR's protection is as yet largely undetermined.[620]

For developing countries, successful import substitution of technology depends on acquiring preferential access to technology, on the grounds that technology is a pre-requisite for and development in LDC's. However, if technology is turned into a trade measure (that is, becomes development related), higher levels of protection for IPR's and the corresponding rise in private appropriability of such rights (the level of private appropriation being taken to rise with the level of protection, degree of exclusivity of rights, etc.[621] will guarantee greater future disparity in material and technological equality between developed and developing countries, whether member to the GATT or not.

6. 5 The Negotiating Mandate, an ignored agenda? Relevancy to Intellectual Property Needs of Developing Countries

The Punta del Este Ministerial Declaration provided the negotiating basis for the new Multilateral Trade Negotiations (The Uruguay Round).[622] The stated aim of the negotiations was to 'preserve the basic principles and to further the objectives of GATT to develop a more open, viable and durable multilateral trading system. The relevant part of the declaration stated that the objective of the Round, with respect to trade related aspects of IPR's, including trade in counterfeit goods was:

> "...to reduce the distortions and impediments to international trade,...taking into account the need to promote effective and adequate protection of IPR's...ensure that measures and procedures to enforce IPR's do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines...without prejudice to other complementary initiatives that may be taken in the World Intellectual Property Organisation and elsewhere..."[623]

The negotiating objectives would be conducted in accordance with the principles of:

(a) Transparency, mutual advantage and increased benefits to all participants;

(b) The indivisibility of undertakings, that is, the different sectoral agreements would all be accepted as a package undertaking and not partially;

(c) Balanced concessions, that is, balanced rights and obligations;

(d) The principle of differential or preferential treatment in accordance with part IV of GATT;

(e) non reciprocity from developing countries in return for tariff and non - tariff barrier removal as part of undertakings made by developed countries during the Round;

(f) Progressive negotiated "graduation" of advanced countries towards reciprocity;

(g) Special treatment for least developed countries: etc.

During the Uruguay Round, the negotiation mandate hasn't been followed, since developed countries have applied a `reverse burden of proof' to developing country negotiation proposals, that is, developing countries have been required to prove the need for non - compliance with the full rigour(s)of a new GATT -TRIP's regime. Conditionalities require developing countries to accede to the GATT IP arrangement, unconditionally accept to respect and enforce "private party agreements on terms and conditions" for transfer and development of technology, etc.

Under the Mid - term Review of 1989,[624] the section dealing with IPR's concluded that during the Round, certain issues had to be discussed, that is:

***Section* 4:**

(i) The applicability of the basic principles of the GATT and of relevant international intellectual property agreements or conventions;

(ii) The provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;

(iii) The provision of effective and appropriate means for the enforcement of trade - related intellectual property rights, taking into account differences in national legal systems;

iv) The provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments, including the applicability of GATT procedures;

(v) Transitional arrangements aiming at the fullest participation in the results of the negotiations;

Section 5:

...The negotiations would give consideration to concerns raised by participants related to the under lying public policy objectives of their national systems for the protection of intellectual property, including their developmental and technological objectives;

Section 6:

...in respect of 4(d) above (immediate), the ministers emphasised the need to strengthen multilateral commitments to resolve disputes on trade - related IP issues through multilateral commitments;

Section 8:

...the negotiations had to promote a mutually supportive relationship between GATT and WIPO;

The foregoing mandate merely instituted negotiations. The *latent legal intentions* behind the creation of the new GATT trade - technology linkage and the likely practical effects of such a linkage on, *inter alia*, acquisition, selection, negotiation and adoption of technology by developing countries may be determined only by analysing the dynamic negotiating positions and strengths of technology exporting (mainly developed states) and those of technology importing countries (the majority of developing countries).[625] The functioning of the resultant international intellectual property and trade system, and the continued effective or non - reactive participation by developing countries in that system, depends on the *perceptible* balanced nature of the results achieved. A brief but critical examination of the

problem as viewed by developed and developing countries and the approach of each group to the international resolution of the issues involved therefore follows.

6. 6 The Problem - Developed countries' perspective - why GATT?

"Perhaps the most difficult question to determine is how much to decide by rule and how much to leave to discretion. It is an advantage, and not a disadvantage, of the scheme that it invites the member states to abandon that licence to promote indiscipline, disorder and bad - neighbourliness which, to general disadvantage, they have been free to exercise hitherto";

John Maynard Keynes - Proposals for and International Currency or Clearing Union (1942) in J. K. Horsefield (editor) The International Monetary Fund (IMF)1945 - 1965, IMF 1969, Volume III, Page 6, 36.

.....

States must be reconciled by rules propriety and not disorder. To create disorder or attempt to reconcile disorder through disorder, *leaves no room for regulation and consequently, for propriety";*

Csaba in Law and Economics, Volume 1, edited by Jules Coleman and Jeffrey Lange, Dartmouth, 1992, Volume 1, at p.229 (italics added).

The above quote from Keynes, though made in a different context and in relation to a different subject, may still sum up the nature of the positive arguments as expressed by developed countries in relation to the subject of the international regulation of trade related aspects of IPR's. The quotation from Csaba may also indicate the problems of applying a dual standard to a common problem, that is, the major examples of 'bad - neighbourliness' and indiscipline, (even with relation to trade in counterfeit and pirated goods),[626] may be traceable to the doors of the major proponents of the "new" GATT - TRIP's regime.[627]

Developed countries resort to *forum hunting*, (specifically to the GATT which was regarded for long, especially by the United States, as designed for trade in goods and not services or intellectual property), is due to domestic 'protectionist' industry or private intellectual property interest "economic or commercially" motivated pressure, that is, largely non legal. Economic and commercial interests in developed countries wish to stem the correction of the WIPO system[628] (which administers many conventions now widely regarded by the majority of states as grossly imbalanced in their comprehensive and meticulous definition of private rights protection (vis-à-vis public interests). Further, within the GATT framework, developing countries can be "negotiated" into offering protection for new objects of industrial property (such as computers and information technologies),[629] without LDC's being able to link such new protection to reform of the multilateral industrial property system.

Further, the *technology access - international trade* linkage will be ensured in practice by, *inter alia*:

(a) Developing countries technological and trade dependency on developed countries;

(b) The complexities of GATT negotiation rules, that, *inter alia*, require that *entire negotiated packages be accepted or rejected as a whole.*[630] (This requirement is however currently acting as a saving factor preventing the adoption of the "reforms" due to continued disagreement among developed countries, especially over the issue of agricultural subsidies.)

6.6.1 Developed Country proposals for GATT based (IPR) "reforms"

The various proposals for the 'reform and strengthening' of the international trade system cannot be usefully or effectively analysed here since they cover a *massive range* of issues related or linked to trade in textiles, services, information technology and 'trade related aspects of intellectual property'.[631] The proposed reforms in the area of 'trade related aspects of intellectual property' may however be outlined briefly in order to determine their possible impact on international technology development and transfer to developing countries, that is, the possible future extent of limitation or restriction of access to technology in developed countries.

The 'reform' position of the developed countries may best be analysed from the view point of the leading reformist states, that is, the United States and the European Communities. Ironically, countries in this group have in practice been responsible for the majority of violations of GATT rules and procedures.[632] Before analysing

the reform proposals, a brief history of their making in a leading proponent home State, that is, the United States, may assist in our highlighting of the underlying theoretical and substantive goals and purpose behind the proposals.

According to a United States Congressional Report (1981),[633] if the United States was to continue financing research and development, to maintain its technological leadership and improve its balance of trade, it had to encourage other countries to provide United States innovators the right to obtain enforceable patents and stop the continuing steady erosion of patent protection.[634] A principal finding of the Committee was that to stimulate or encourage investment in innovation and the commercialisation of inventions, the risks involved in decisions to commercialise had to be reduced, for example, by making inventions the subject of reliable patents internationally and reducing uncertainties relating to the utilisation of patents rights through quick and inexpensive dispute resolution mechanisms.

The report also noted that since foreign trade in the form of direct exports, foreign investment subsidiaries and manufacturing facilities is an ever increasing part of United States enterprise, it was important to ensure that United States enterprises were not exposed to unfair competitive pressures by host country enterprises, for example, when such host country enterprises were allowed to exploit successful innovations without permission from the rights owner. To ensure reliable patents abroad for United States inventors, other countries, notably in Latin America, Asia and Oceania (with the exception of Japan, Australia and New Zealand) and Africa (with the exception of South Africa) had to be convinced that the "largely United Nations Agencies inspired view that a strong, efficient patent system was contrary to their interests", was erroneous. Developing countries would in the long run benefit if

they offered protection for intellectual property, especially industrial property rights, under the national treatment principle, by attracting investment, creating employment and *encouraging the transfer of technology.* The report concluded, *inter alia*, that the United States government action to support the re - establishment and maintenance of a full and effective patent system in foreign countries, (which would in all likelihood be supported by other industrialised nations):

> "would no doubt trigger resistance and protest from third world governments, various international organisations and United Nations agencies. The United States might be accused of serving its own narrow self - interest..... The good faith of the United States in striving to assist developing countries in their rapid development and industrialisation might also be questioned".[635]

The foregoing outlined intentions of the United States could not however be easily implemented for various reasons. Principal among the obstacles was the historical non membership of the United States to the Berne Convention.[636] The principle reason often cited for United States non membership to Berne is that the Convention included various concepts at variance with United States law, for example:

(i) Automatic recognition of copyright without any formalities;

(ii) The protection of moral rights;

(iii) The retro-activity of copyright protection with respect to works already in the public domain of the United States.

However, the historical reasons are more revealing. The United States declined to participate in the 1886 Diplomatic Conference, (only sending an observer) because foreign works were not protected in the United States under its

copyright law.[637] From 1891 to 1952 when the United States joined the Universal Copyright Convention, protection of foreign works was achieved through bilateral treaties. For United States works, from 1891 until its accession to Berne, United States copyright owners were able to take advantage of National treatment and the so called *backdoor* to Berne, to obtain Berne protection through simultaneous publication in the United States and a Berne country (often Canada) in accordance with requirements under Article 3(1) of the Berne Convention that extends protection to the works of authors of non Berne countries, if the works are published simultaneously in the country of origin and in a Berne country.[638] However, in order to raise its legal-political profile in future GATT negotiations, Berne Convention membership was essential, especially if Berne standards were to be promoted for recognition as 'the minimum standards of protection for copyright'. Further, an advantage of Berne membership is the provision which allows Convention members to retaliate against the works of non - member States which would provide further legal 'leverage' when seeking to enforce IPR's through the GATT mechanism against uncooperative States.

The European Community proposal, largely focuses on questions of enforcement of IPR's at the national level and border measures.[639] Generally, it addresses the GATT - WIPO interface and the application of GATT general principles and mechanisms to ensure trade liberalisation, the application of the GATT - MFN and NT standards, dismantling of trade barriers, transparency, consultation and dispute settlement to IPR's. However, in response to its smaller industrial members,[640] the proposal mentions in its introduction the possibility of excessive protection of IPR's and the need to prevent misuse of rights.[641] Despite the implicit recognition of the possible abuse of IP rights,[642] such abuse is thought

best controlled through minimal if any imposition of limits on private or individual judgement.

From the foregoing, it may be concluded that:

(i) The leading "reformer" nation, that is, the United States, was historically able, in its earlier stages of development, to take advantage of "territoriality" based measures to protect its nationals wishing to exploit otherwise protected intellectual property (technological) rights belonging to non nationals, an option being denied to LDC's;

(ii) Commercial and trade interests in the United States, due to the increased *privatisation* of technology (that is, that variety of processes which result in a resource, product or a technology being moved out of the public domain into the control and/or ownership of private parties, whether individual or corporate),[643] have increasingly prevailed over United States public international obligations to promote international technology development and transfer, except on private commercial terms and conditions.

6.6.2 The Proposals

Since the substantive legal and policy position of other leading industrialised and trading nations does not now significantly vary from the "pro - private rights owner" position of the United States, except on a few specific issues,[644] separate treatment of each proposal would only be repetitive, though substantive differences are pointed out in context below.

The proposals aim to establish a regime which "increases" levels and standards of international protection for intellectual property (patents, trademarks, industrial designs, geographical indications of source, copyright and meighbouring rights and integrated circuit layout designs, [645] etc.) and the effectiveness of the enforcement of such rights. The stated objectives of major developed countries' proposals are centered [646] on:

(i) Increasing protection through extension of economic rights contained in the conventions;

(ii) Ensuring future adaptability of a GATT regime to protection of new and emerging technology;

(iii) Causing all parties to incorporate and observe the "agreed measures".

Safeguards against abuse of increased levels "protection" by IPR's owners are referred to only in the negative sense, for example, as "possible barriers to trade". Affected countries would correct such abuse only through non exclusive measures, such corrective measures being detailed and comprehensively set out in the laws and regulations.[647]

6.6.3 The principal objectives of developed country GATT - TRIP's proposals.

The developed countries have the following objectives in instituting the GATT - TRIPS reforms:

(a) The creation of effective economic deterrent(s) to international trade in goods and services that infringe intellectual property rights through the implementation of border measures;[648]

(b) Causing further recognition and implementation of standards and norms that provide adequate means of obtaining and maintaining IPR's and providing a basis for the effective enforcement of such rights;

(c) Extension of protection beyond the traditional forms of intellectual property, that is, patents, trademarks and copyrights, to include trade secrets and "information technologies", despite the undetermined legal nature of the "new rights",[649]

6.6.4 Specific Substantive Aims

Patents

(a) Patentability: Patents are to be available for *all products and processes* which are new, useful and non - obvious. This position exceeds the Paris Convention territoriality standards which allow determination of patentability by member States.[650]

(b) Term of protection: Protection to extend for a minimum term of twenty years. Such protection extends beyond Paris Convention standards since the Convention does not include a minimum term.

These two - (a) and (b) above - are further examples of the erosion of the important principle of territoriality.

(c) Rights conferred: The proposals maximise the patentee's rights. The patentee is to be protected against infringement (copying, using or selling the said

invention) and be legally empowered to import, use or sell the direct results of the process, [651]

(d) Use without authorisation from patentee: Traditionally, the Paris Convention stresses non - revocation of patents on the grounds of non - working. Grant of use rights by granting States to private parties without patentee's authorisation is to be non - exclusive and 'limited' to cases of national emergency or to remedy an adjudicated violation of anti -trust laws.[652] Patents may also be exploited without authorisation for governmental purposes or compelling purposes.[653]

Copyright

(a) Subject matter: Copyright inheres in a work from its creation. The proposals extend the Berne and Universal Copyright Convention (UCC) requirement that works of a literary, scientific and artistic nature be protected, to protection for all forms of original expression. The new proposal intends to ensure protection for all possible future forms of IP, (expressed as 'forms yet to be developed in the United States 1987 proposal), in tune with the rapidly changing commercial technology market, centered in developed countries.

(b) Protection for rights: The Berne Convention standards, that is, automatic extension of protection in all member countries for all original works protected in a member State, are extended to protection of all original works upon creation without any subjection to formality requirements - publication, communication or dissemination. Economic rights under copyright "shall" be freely and separately exploitable and transferable. Transferees (assignees and exclusive licensees) shall e entitled to full enforcement of their acquired rights in their own name.

(c) Limitations to rights: The Berne Conventions provisions (reproduction, translation, adaptation, etc.)[654] on limitations and exemptions are largely conformed to in the proposals. Compulsory licensing is however, to be

non - exclusive and limited to instances where legitimate local needs cannot be met by voluntary actions of copyright owners and to works and uses set forth in the Berne Convention. *Transparency* requirements are to e satisfied and the owners be notified and given an opportunity to be heard before non - consensual use of their right. Prompt payment of royalties consistent with those that would be negotiated on a *voluntary basis and workable export prevention* systems, are to be maintained by the issuing State (of a non - voluntary licence), etc.

These proposals contradict the Berne Appendix (Protocol) which has regulated developing countries resort to compulsory licensing of rights of translation and reproduction of copyright able works[655] . Most important to developing countries, the proposals would "curtail" the Convention position which allows member States to determine the scope of reproduction rights under their national legislation - Article 9(1) of Berne.

Information Technologies (for example, *Semiconductor Chip Layout-Designs* protection).

Among others, the proposals under this head are speculative (that is, they involve rights of as yet largely undetermined legal nature, even in the technologically most advanced countries) or are intended to internationalise national laws. An example of the latter is the United States proposal on integrated circuits which if accepted, would "internationalise" United States municipal law [656] on semi conductor chip protection.

(a) Rights conferred: The owner of layout design would've the exclusive rights to reproduction, design incorporation into a circuit (s), importation and distribution of integrated circuits incorporating the design and to assign or authorise use of such rights, etc. Exceptions to these rights are primarily identical to those applied to copyrights.

(b) Enforcement procedures: Remedies would include seizure, compensation, forfeiture, injunctions, as well as criminal sanctions. Because these procedures are primarily aimed at the Newly Industrialising Countries (NIC's),[657] which are technologically competitive, affect third country markers or possess large domestic markets, a due process of law clause, that is, guarantees of notice, NT for non - nationals, access to judicial and administrative authorities, written submissions, etc., is included in order to reach within the borders of these countries. The clause would require judicial review of initial judicial decisions and of final administrative decisions, on the merits of a case.

Trade Secrets

Trade secrets would be protected internationally for the first time. Trade secrets are primarily constituted as private contract rights and hitherto have received protection only under national trade secret or business information laws. The new rights to be conferred would relate to protection from 'actual or threatened misappropriation', that is, disclosure or acquisition in a manner contrary to honest commercial practices. The incorporation into the multilateral legal framework of GATT would complete the circle of home State extra territorial legal protection of the economic rights and interests of their nationals (IP owners).

6.6.5 Summary of latent objectives in developed countries proposals.

Overall, the major developed countries' position advocates maximum implementation of measures to protect or enforce IP rights, unless such measures "create barriers to legitimate trade",[658] or constitute forms of abuse recognised under anti - trust rules (for example, as under the patent - misuse or exhaustion doctrines), prevails. Given implementation of the proposals, developed countries will achieve

effective control over developing countries' *technoeconomic* development, by interalia:

(a) Subordinating developing countries primary development goals such as the promotion, through international cooperation, of technological research and development on their territory, maximisation of exploitation of foreign owned IPR, importation of technology on preferential terms, etc., to development related objectives of international trade.

(b) Limiting their capacity to resort to 'non voluntary' methods and tools of enforcing exploitation of granted rights, whether to prevent abuse of such rights by IPR's owners or to achieve development goals not deemed by rights owners or their home States as vital[659] to the operation of the intellectual property system or "free trade";

(c) Turning intellectual property rights into a trade measure, enforceable in line with home country interests. Such enforcement would be facilitated by the GATT - TRIP's regime's expansion of the grounds for initiating a complaint under GATT about another country's policy measures (that is, the possible new grounds would include unfair trade practices, inadequate protection for intellectual property, 'unacceptable' Labour standards, etc., all of which have hitherto been outside the GATT).[660]

(d) Limiting developing countries' ability to resort to safeguard action such as under that now available under GATT Article XVIII (which allows a country to impose trade barriers to manage adverse balance of payments and other problems) due to fear of "arbitrary" retaliation.

6.7 The Developing Countries, why not GATT: Developed Country GATT - TRIPS proposals a reversal of the Paris Convention Reform efforts?

> "Presently, only few countries are in position to take greater advantage of a very strict protection of IPR's. That is so because these countries maintain a monopoly of technical knowledge, dispose of a long tradition in managerial capacity as well as wide financial resources. Those which are not able to take advantage of the incentives provided by it are obliged to use such protection in a way that ensures the safeguard of domestic technological development"
>
> **Brazilian Submission to the Negotiating Group on Trade - Related Aspects of IPR's (1988)**[661]

The position of developing countries, which is steadily being eroded, is in favour of *progressive* evolution and observance of speciality of function for international institutions.[662] Developing countries point to the growing tendency to treat intellectual property as a purely commercial issue (including the widening of the mandate to commercial secrets), without taking into account the primary development aspects, that is, technology development and transfer or the need to acquire technological capacity by developing countries.[663] Therefore, in relation to the creation of new standards and principles concerning the availability, scope and use of intellectual property rights, developing countries have stated some of their principal objections to a GATT - TRIP's regime in terms of international transfer of technology as being:

6.7.1 Threat to Territorial Sovereignty:

Developing countries assume the historically supported argument that all States should have the sovereign right to ensure a proper balance between rights and obligations of intellectual property rights holders, and thus to determine the level and scope of protection of these rights, in particular in sectors of special public concern such as health, nutrition, agriculture and national security.

The territorial limitation of IPR's[664] as traditionally understood, ensures that every literary, scientific or artistic work should be protected outside its country of origin according to the same laws as rights of nationals are protected (*Paris Societe des Gens de Lettres,* 1878) *with rights being enforced and remedies sought in each country, according to its laws and recognised minimum international legal standards.* Consequently, it has been assumed that subject to the minimum standards as provided for under the international intellectual property treaties, the legal effects in the granting State are to be determined in accordance with the vital national interests of the granting State.[665] Such a position respects the sovereign discretion of the granting State in determining its primary interests and enforcing them under its national law (for example, under the terms and conditions for use of the rights it grants).[666]

Under the Punta del Este Declaration,[667] the Ministers recognised that negotiations on trade - related aspects of IPR's would give consideration to, *inter alia*, concerns raised by participants related to the underlying public policy objectives of their national systems for the protection of intellectual property, including developmental and technological objectives. Though this consideration is

in principle recognised under the Preamble of the Draft Agreement[668] submitted to the parties by the GATT Director General for consideration, the rest of the Draft terms and conditions take little account of the practical conditions of 'unilateral' international technological ownership which forces benefits to flow unidirectionally. Developing countries therefore face under the GATT measures a reinforced introduction of the equivalent of conditional MFN[669] (that is, material reciprocity), into the international IPR's regime.[670]

6.7.2 Re-interpretation of GATT rules by developed countries?

The application of the national treatment principle as understood in GATT to trade related aspects of IPR's, that is, "treatment no less favourable than that accorded by a party to its nationals[671] and any advantage, favour, privilege or immunity granted to nationals must (shall) be accorded immediately and unconditionally to the nationals of all other parties",[672] requires that a government uses no means other than those authorised by the GATT to discriminate between a foreign and domestic innovator or supplier of technology. Such measures can have a variety of damaging effects on developing countries' technology development transfer goals, that is:

(i) Since tariffs (the normal GATT major tool) do not apply to most IPR's and therefore cannot be used to protect domestic technology suppliers or innovators, the proposition that national treatment should apply to exchange and trade in IPR's implicitly requires removal of protection for domestic innovators or suppliers[673] of technology vis-à-vis foreign competitors, that

is, there should be no *effective* protection for local innovators against foreign innovators or technology suppliers. Such a situation would increase the already abundant opportunities for imposition of restrictive conditions and terms by suppliers of technology.

This problem will remain even given the suggested GATT - TRIP's equivalent for "emergency[674] protection", subsidy and dumping actions,[675] that is, Article VIII of the Draft Agreement on trade - related aspects of IPR's. The Draft provides, *inter alia*, that parties may provide under their municipal laws and regulations, measures necessary to promote the public interest in sectors of vital importance to their *socio-economic* and technological development,[676] since such national measures must be consistent with the provisions of the GATT Agreement limitations or exclusions (for example, regarding protection of computer programs and compilations of data),[677] must not conflict with 'normal exploitation' or unreasonably prejudice the legitimate interests of the rights holder.[678] Consequently, the GATT agreement will provide an extension of private rights into international obligations, thus reinforcing the requirement of States to abstain from measures incompatible with such private rights which shall be expressed as international obligations).

(ii) Developing country's sector and product exclusions shall be curtailed denying them of the same mechanism now developed countries have historically resorted to and still use to protect their vital national interests.[679]

(iii) The achievement of a high standard of protection for IPR's, at the global level, reduces the level of local technological ownership in the developing

countries. This condition arises because standards of novelty, inventiveness and utility are higher under a universal standard, thus reducing the actual level of grants by developing countries to their nationals.[680]

(iv) The "non consensual"[681] inclusion of issues concerning standards and principles affecting the availability, scope and use of intellectual property rights (herein after IPR'S) with liberalisation of international trade and not protection, can only reinforce, especially in the long run, growth of material and technological inequality between developed and developing countries;

(v) Though the GATT proposals by developed countries are apparently based on free trade assumptions, opposing any interventionism, the heavy subsidisation of technological innovation in developed countries and the prevalence of intra-firm trade between large affiliations of firms from developed countries (which already accounts for over fifty per cent of international trade) introduces strong elements of "private interventionism."[682] Such private interventionism, backed by unilateral or arbitrary[683] home country support for exclusive economic rights of IPR's owners, shall limit developing countries ability to force regulations against technology owners who are non nationals, especially in relation to disclosure of inventions, local working requirements and remedies for lack of use or inadequate use or inadequate use of patented inventions,[684] etc.

The heavy subsidisation [685] of 'new technologies', though currently not assessed and therefore unopposed in GATT,[686] nullifies any claims to a 'level playing field'[687] in the field of trade related aspects of IPR's. Developed countries have argued that subsidies for the development of new

technologies differ from those granted to keep obsolete industries open,[688] that is, that, *inter alia*, the Subsidies Code provides for the admission of subsidies whose objective, is *inter alia*, the encouragement of research and development programmes, especially in the field of high - technology industries.[689] However, the "unilateral" international ownership of technology would cause developing countries to suffer increased dumping of technological goods or products made with "subsidised" technology, thus further restricting or development in the affected countries.

While developing countries could refuse to offer protection for heavily publicly subsidised technologies, that is, treat such technology as an "unfair practice", such action would be open to retaliatory trade sanctions.[690]

(vi) GATT principles primarily apply to countries at similar levels of *technoeconomic* development. Developing countries stress their routine adherence to the most favoured nations and reciprocity principles in trade and economic relations amongst themselves, whether at the bilateral or multilateral level.[691] These principles are not therefore objected to in their proper context, especially when their effect is to extend reciprocal advantages and facilities such as reduced tariffs and orderly quotas to all countries involved in trade or economic co-operation on a materially equal basis. Though GATT now recognises "differential and more favourable treatment of developing countries' as a 'new' regulatory principle[692] the principle is in practice, as noted above, honoured "more in the breach" than observance, by developed granting countries, that is, developed countries circumvent the provisions of GATT Part Four under various so called managed trade "grey measures"[693] and escape clauses[694] or by unilaterally insisting that

developing countries that have achieved "production efficiency and competitiveness" reflect such achievement in the assumption of "some commitments"[695] . The integration of IPR's into the international trading system, while legitimising the international mechanism for the appropriation of new knowledge, would thus institute an unbalanced international technology exchange and trade regime between developed and developing countries. This would further enhance developed country regulation and control over the international diffusion of technology. [696]

6.8 Resume of developing country position

Briefly, developing countries have argued that there must e no harmonisation of national intellectual property systems except in so far as is necessary to establish general standards to which members would "gradually" adjust[697] . Territoriality must be respected and primary development needs, especially for technology development and transfer, must be safeguarded through product and sector exclusions, use of mandatory enforcement measures (for example, compulsory licensing) to ensure, inter alia, exploitation of protected rights, etc.

6.9 The Draft "Agreement"

It may be concluded that not withstanding resistance by developing countries, developed countries will have trade related aspects of IP incorporated within the GATT framework. proof of such a proceeding is available from a reading of the current Draft Agreement,[698] (though it has been alleged to be unsatisfactory to both groups of countries).[699]

The agreement, (which has to be accepted or rejected along with the rest of the negotiated package which includes tariffs, non tariff measures, tropical products, textiles and clothing, natural resource based products, agriculture, services, trade related investment measures - **TRIMS**), closely echoes the United States proposals in vital respects. Fundamental substantive issues relating to balance of public and private rights and measures, development and transfer of technology, etc., have been circumvented or left unresolved. The provisions that greatly affect LDC's acquisition of foreign technology include [700]

(a) The effective scope of application of GATT - MFN provisions - Article 4 of the Director General's Draft;

(b) The scope of and need for protection of certain information technologies, especially the new extension of protection (especially through Copyright)[701] to computer programmes and compilations of data - Article 10 of Director General's Draft, rental rights - Article 11, etc.,

(c) The duration of protection for now or original industrial designs (including textile designs protected under industrial design or copyright, Article 25, which shall be at least ten 10 years, Article 26, of the Director General's Draft. This measure would strengthen developed country control over, inter alia, the textile industries of developing countries which are already subject to the extra GATT multifibre arrangements.

(d) Patentable subject matter. Patents to be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step (non - obvious) and are capable of industrial application (useful), without discrimination as to place of invention, field of technology, and whether products are imported or not - commercial exploitation may only extend to:

(1) Measures necessary to protect the ordre public or morality, including protection of human or animal or plant or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by domestic law - Article 27(2);

(2) Diagnostic, therapeutic and surgical methods for the treatment of humans or animals - Article 27(3)(a);

(3) Plants and animals other than micro organism - Article 27(3) (b);

(4) Effective resort to compulsory licences, (restricted to a narrowly defined public interest and subjected to a prompt compensation standard),[702]

(5) *Admissible* limitations on abusive anti - competitive practices related to intellectual property rights (which inhibit international trade or technological development in the technology acquiring country, for instance imposition of territorial restrictions, including restrictions of trade in or export of patented products, tied sales etc.);[703]

(6) Trade secrets, scope of and need for protection.

The Director General's GATT - IPR draft also follows the developed country position and provides for a GATT council on trade - Related Aspects of Intellectual Property Rights which is, *inter alia:*

(i) To function alongside GATT and the proposed Agreement on Trade in services;

(ii) Establish co-operative arrangements with WIPO;

(iii) Monitor operations of the Agreement (including compliance);

(iv) Facilitate consultation on TRIPS;

(v) Provide assistance requested in the context of dispute settlement procedures;

(vi) Receive notifications or submissions from parties concerning their national laws, regulations or agreements affecting the agreement, in pursuance of transparency enhancement;

(vii) Facilitate enforcement, etc.

6.10 GATT - IPR provisions and the Transmission of Technological Capacity to Developing Countries, Conclusions

Developing countries right to apply the intellectual property system as a `defensive' mechanism against further restriction of international access to industrial property available in developed countries, is inherent in the concept of sovereignty and is preserved in territoriality and long standing practice of all countries.

Consequently:

(a) GATT reforms would, by enhancing the commercial elements of IPR's, erode the power of the granting State to ensure that all rights conform to the quid pro quo arrangement underlying all exclusive rights, that is, the service of the public interest rather than a primary guarantee of private income to creators.

(b) The GATT - IPR regime would in effect directly link IP protection levels in developing countries to access to technology by those countries. Such a link would legitimate the use of further `conditionalities' or `sanctions' by developed countries to further restrict access to technology. By increasing pre-conditions for acquisition of technology, the levels of remuneration for technology owners would be artificially increased.

(c) The Gatt system is primarily based on material reciprocity and only offers *discretionary* preferential treatment for LDC's. GATT also deals with international trade, which is a development related and not primary development issue. Therefore, GATT would not offer adequate balance between protection of IPR's (including their commercial use), with primary development interests of developing countries (including the need for fair and favorable treatment for developing countries and special treatment for the least developed among them, in their technology development and transfer requirements).

(d) The introduction of product and process patents[704] as a *defacto* universal right for IP owners, will open the potential for application of trade measures in virtually every instance products are made (competing or not) by a developing country national or enterprise applying reverse engineering or other experimental methods or processes of making the same product. The GATT `reforms', by bestowing universal rights on IPR's owners, will in effect afford them universal protection against independent evolution of similar technological products or designs. Such a situation would amount to the above mentioned conditioning of *technoeconomic* conditions and markets in developing countries, that is, the GATT reforms would enable the use of IPR rights to, inter alia, segregate markets by for instance facilitating the elimination of parallel imports, restricting licensed rights, etc.

(e) Control over developed countries *technoeconomic* development will be achieved by limiting their capacity to resort to `non voluntary' methods and tools of enforcing exploitation of granted rights,

whether to prevent abuse of such rights by IPR's owners or to achieve development goals not deemed by rights owners or their home States as `legitimate', such legitimacy being principally determined on the commercial grounds. Consequently, developing countries ability to enforce local technology development regulations against technology owners who are non nationals, especially in relation to disclosure of inventions, local working requirements, lack of use or inadequate use of patented inventions, etc. will be curtailed.

Below, we argue that, there must be no linking of member State's acceptance of GATT - TRIPS measures to technology development and transfer and technical co-operation, unless *developed countries offer equivalent concessions*, for example, in the area of agricultural trade, textiles, etc. As shown above, *trade related aspects of intellectual property affect the acquisition of a technological capacity by developing countries*. The effects may range from the general, such as restriction of the developing countries technological choices, ability to regulate trade related abuses of intellectual property rights that restrict technological growth, to the specific such as elimination of developing countries issuing of special patent rights, making of patent or sector exclusions, etc. Therefore, only the adoption of equivalent concessions under the GATT -TRIPS regime in accordance with the balance of commitments principle would guarantee that the international trade regime would not worsen the technology imbalance between developed and developing countries. Further, without balanced commitments (which excludes international trade conditioning), developing countries cannot make free technological development and regulatory choices unlike the now developed countries which were, historically, able to do so without imposed restriction. This means that developing countries must be allowed *more than time periods* to adjust their intellectual property regimes to the required international standards, that is the factors

surrounding their technological development are considered and effective implementation of preferential access to technology is undertaken, the standard of such preferential treatment being in accordance with the level of technological development. Further, home States must undertake to assist developing countries in the regulation of the technology and trade related activity of enterprises based on their territory, that is, to ensure that such enterprises effectively participate in the technological development of developing countries.

CHAPTER SEVEN

The United Nations Code[705] Of Conduct On The Transfer Of Technology

7.0 Issues

> "...the industrial revolution of the nineteenth century is being paralleled, in its effect on international relations, by the technical revolution of the twentieth century; as new conditions are produced, or old conditions changed, need arises for new law...customary guidance does not fully serve this need; nor are courts able to fill it".[706]

The Code of Conduct raised a great number of "new" international legal issues, especially in relation to the role of international law in the facilitation of a new international order. Many of the legal issues have already been answered, either by States' practice or through various international technology transfer related international agreements.[707] Thus, according to a recent UNCTAD report,[708] informal consultations have revealed that the major part of States's policy practice and conceptual approaches, at the national and multilateral level, shows that States would now accept a framework treaty type Code. Such a Code, concluded as a global or universal framework of rules and principles on development and transfer of technology, would reflect all parties needs, legal and non legal, in accordance with balance of commitments. It would provide for normative flexibility and institutional follow up of the dynamic changes in a technological environment.[709]

A few issues however remain unresolved before an international Code that can facilitate the crystallisation and extension of international law norms to the regulation of all international technology transfer transactions is concluded.

The remaining issues, as shown in the discussion below, *do not go to the very heart of the formation* of a Code, as thought by some legal critics of the Code negotiations. The issues include:

(a) Whether an international Legal Code for the regulation of international technology transfer is necessary;

(b) Whether if a Code is necessary, it should have legal provisions of a binding or voluntary nature, be passed by consensus (majority) or consent (unanimity). If passed as a voluntary instrument, to what extent would it depend on national adoption for implementation;

(c) Whether the Code should contain self executing provisions or contain general provisions which can be generally and discretionary applied;

(d) Whether the Code should facilitate full harmonisation of various national regulations or promote international minimum legal standards,

(e) Whether the Code can adequately define international technology development and transfer, for purposes of extending international law to cover the entire process;

(f) Whether technology should be regarded under the Code as part of the "common heritage of mankind".

(g) Whether the Code contains adequate provisions to reduce the effects of the disparity in bargaining and negotiating powers between suppliers and recipients of technology;

(h) Whether the Code's provisions would actually promote transparency[710] in recipient countries technology development and transfer regimes and improve balance of legal entitlements and mutual confidence between the parties;

(i) Whether the Code's provisions would be of any relevancy to the regulation of restrictive practices in international transfer of technology transactions;

(j) Whether the Code's provisions would fully resolve the choice of law issues commonly raised by international development and transfer of technology transactions;

(k) Whether the Code should contain provisions for preferential treatment for all developing countries and define the standard of such preferential treatment, that is, whether special or fair and favourable;

(m) Whether the Code would facilitate LDC "mutual self help", that is, through South-South technological co-operation;

(n) Whether the implementation machinery and co-ordinating instruments created under the Code could in practice play any meaningful role in the establishment of pre - peremptory norms for the regulation of international transfer of technology transactions.

The issues are not discussed in the order set out above and a few are rhetorical. Instead, the form of the current Draft Code is followed since it provides an adequate arrangement for discussion.

7.1 The United Nations Code on Transfer of Technology - Why the need for a Code of Conduct

The objective conditions that gave rise to the debate[711] on the need for legal regulation of international transfer of technology are multifarious and cover both the national and international arenas.[712] Despite often intense discussion of the issues at both the national and international levels there is a continuing failure or impasse in dealing concretely with the legal problems created by international transfer and development of technology, especially in the "North - South" Context. The Code, as a future legal global framework providing norms and standards, though currently in still waters, provides a continuing hope of the extension of international law to cover the entire international technology process.[713] In its entirety, the Code is an

instrument structurally and procedurally directed at protecting developing countries, assisting them in acquiring technology on appropriate terms and conditions, thus facilitating their assimilation and use of such acquired technology to achieve technological capacity (technology development).[714]

The issues which proved difficult to resolve during negotiation were mainly caused by developed party concentration on:

(i) The issues of quantitative technology flows and the commercial motives underlying the flows, that is, the protection of rights of supplying parties;[715]

(ii) Objection to the definition of internationally restrictive practices;

(iii) Continued resistance (especially by major technology exporting nations)[716] to the extension of international legal norms to cover the entire process of international technology development and transfer;

and for developing countries: (i) Continued failure to distinguish between fundamental development and development related issues, especially for purposes of determining law applicable, impact of States and private party international technology development and transfer practice[717] on international legal norm formation and extension, etc.

Further, negotiations were hindered by the historical dearth in international negotiation and law of multilateral measures, instruments and procedures for mutual and co-operative resolution of development problems[718] and continuing preference by developed countries to `aid' rather than technologically co-operate with developing countries.[719]

In its many positive aspects, the Code mirrors the United Nations perception of an *organised and increasingly interdependent international community*[720] and does not simply juxtapose contrasting views or unilaterally create new law,[721] as often charged, though the tendency to paper over problems is sometimes strongly evident. The Code approach is to consolidate earlier fragmented or uncoordinated international or multilateral legal efforts (such as provisions on restrictive practices in the Havana Charter, the Code on Restrictive Business Practices, the Law of the Sea Convention,[722] etc. into a single concrete coordinating legal document reflecting the interests of an organised international community.[723] Such a goal is in line with the primary goals of the United Nations Charter, specifically the extension, through lawful means, of the benefits arising from science and technology, to all countries. It is also in line with the objectives of the specialised United Nations Agency mandated to facilitate the development and extension of international legal norms in the area of international development and transfer of technology, that is the United Nations Conference on Trade and Development (UNCTAD).[724]

The elaboration of the Code of Conduct was effectively undertaken in the 1970's in the United Nations Conference on Trade and Development forum with `minimum' participation by developed countries.[725] The continued lack of consensus lent an adversarial dimension (North - South) to a problem which is otherwise universal. At the start of the negotiations, developing countries called for a legally binding Code, on grounds, inter alia, that technology forms part of the common heritage of mankind,[726] a demand, which has been gradually abandoned due to the declining negotiating and bargaining power of developing countries,[727] Similarly, the claim for absolute right to regulate, under national law, all aspects of technology transfer transactions occurring on the territory

of the host States is now modified in practice,[728] that is, to distinguish between fundamental development goals.

Developed countries, have shown little willingness to admit the inappropriateness of some of the traditional international law "obligations" when applied to a wider technologically unequal international society.[729] Such laws include principles derived from anti-trust and competition laws, principles that were developed to meet the particular *socio-economic* needs of developed countries. Thus for instance, home States show a disinclination, to accept the duty to co-operate with host States to prevent enterprises based on their territory (especially transnational corporations) from abusing their negotiating and bargaining monopoly positions.[730] As a result, the controversy over the central issue of restrictive business practices continues unresolved, especially since developed countries "interpret" it to be largely *ultra vires* the primary scope of the Code.[731] Similarly, special treatment for LDC's is also opposed as contrary to the private rights of technology owners.[732]

7.2 Preamble

In interpreting the Code, it is vital to give a proper interpretation to the preamble provisions since the preamble affects the rest of the text of the Code.[733] Many early authorities regarded the preamble as part of the preparatory work, that is, not forming part of the context of a multilateral instrument.[734] Today, the main objects or intentions of the parties to a multilateral agreement is often sought for in the Preamble. The intention of the parties is very important since it is the basis on which the parties base the interpretation of their obligations when implementing a multilateral instrument.[735]

The Draft Code has been claimed to contain deliberate ambiguities (so called "constructive ambiguity"),[736] in an attempt to balance the interests of the parties. The result of such ambiguities, the critics maintain, is only to achieve "negotiated successes" which prove to have little value beyond the ceremonial.[737] The contents of the Preamble were negotiated in detail, in order to avoid a resultant Code that would maintain the legal "status quo" on the one hand or avoid creating a legally binding Code, on the other. If there are ambiguities in the Preamble, they reveal the "effective intention" of those States which hold the large part of intellectual property and related rights, since it is this latter group of States that can guarantee the success of the instrument. Developing countries attempts to influence the legal nature and form of adoption of the Code (article 11 and 12), have gradually withered,[738] reflecting their declining negotiating and bargaining power position.

The decline in negotiating power position of developing countries is also reflected in the exclusion of the phrase "*common heritage of mankind*" from the Preamble.[739] The current agreed draft of the Code,[740] however, like earlier drafts, recognises the fundamental role of Science and Technology in the *socio-economic* development (taken to include technological development) of all countries. Under Paragraph 2 of the Preamble, the right of all peoples to benefit from advances and developments in technology in order to improve their standards of living is affirmed. Suppliers and recipients of technology are to "respect each other's rights". Transactions are to be conducted on "justifiable" and "reasonable" terms.

Paragraph 4 calls upon "all countries" to facilitate the adequate transfer and development of technology and to strengthen the scientific and technological capabilities of developing countries. Such States co-operation is a necessary precondition for the establishment of a new international economic order.[741] The

importance of technology transfer to the continued maintenance of international peace and co-operation is reflected in the call to promote peace, security and international independence through international scientific and technological co-operation.[742] Recognition is given to the mutual *inter dependency of national and international* measures if increased levels in technological flows are to be achieved[743] under a universally applicable Code.

However while the parties are agreed on the need for a "universal" Code, developed and developing States attach a different interpretation to the duties and rights arising under such a universal Code. Specifically, developing countries interpret a universal Code as requiring home States, *inter alia*, to control and prevent enterprises based on their territory from using restrictive practices. Developed countries stress freedom of contract and performance of contracts according to party agreements.[744] However, to achieve balance of entitlements, it is necessary to weigh non monopolistic competitive abilities[745] and national security considerations of home States against a duty to avail access to technology for all peoples. These duties of home States should be specified or delimited, rather than referring to them as a general duty on home States to encourage compliance with the Code, that is, even if it's agreed as a non binding instrument, the Code should establish norms and standards capable of implementation.[746]

Tentatively, we may conclude here that the Preamble in its current form, is based on the need to achieve general compromises between adversarial positions. The Preamble hardly distinguishes between fundamental developmental goals and development related issues, with a resultant effect, among others, of over emphasis on the commercial aspects of technology transfer flows throughout the Code. The

non distinction has also complicated resolution of the issue of the exact interrelationship between national laws and regulations relating to international technology development and transfer and a new comprehensive multilateral regime.

Consequently, the major objective of the Code, that is, extension of international law to cover the entire technology development and transfer process by inter alia, assisting developing countries to acquire technological capacity and import substitute technology safely and on adequate or appropriate terms and conditions while guaranteeing adequate protection for intellectual property rights and promotion of fair and equitable remuneration for use of such rights, etc. have become inter linked with the soft - hard law debate and traditional issues of the foreign investment regime such as standards of compensation for compulsory acquisition of property rights belonging to non nationals, etc. For resolution of these and related issues, as stated above, it is important that the *general principle of balance of commitments be applied to use of sovereign rights by developing countries to ensure strict legal compliance with their primary development needs on the one hand, and the need to ensure, through international law, adequate continuous production and international dissemination of ideas, on the other.* Adequate protection for technological property rights of non nationals in recipient States or standards of compensation in cases of compulsory acquisition, etc. must be judged in the light of these two conditions.

7.3 Definitions and Scope of Application (Chapter 1)

7.3.1 Parties

Party in the Code covers *inter alia*, any person, whether natural or juridical, of public or private law, individual or collective as well as States, government agencies and international and sub-regional organisations regardless of the economic and other relationships between and among them.[747] The definition attempts to cover all possible foreseeable parties to international technology transfer transactions,[748] though States are the primary addressee's. Developed countries, as in other forums,[749] have consistently objected to the inclusion of entities under common control, that is, subsidiaries, incorporated branches or affiliates of transnational corporation's as separate parties for the purposes of the Code as unreasonable intervention in private party activity.[750] The objections are frequently buttressed by the implied restriction of "direct private foreign investment" in those countries wishing to regulate intra - firm activity, whether under a legal Code or not.[751] As stated above, the objective test is whether the intra - firm transaction promotes international development and transfer of technology.

7.3.2 Definition of International Technology Transfer

The Code does not define technology. However, a legal definition of technology as systematic knowledge usable in the manufacture of a product, application of a process or the rendering of a service[752] is now widely accepted. Technology transfer is defined under the Code as the *transfer of systematic knowledge for the manufacture of a product, application of a process or rendering*

of a service, excluding the sale or lease of goods[753]. The latter part of the definition excludes mere sale or delivery of technological goods or processes in which the recipient plays a passive, non learning role. In our introduction, we interpreted the definition as excluding `technological islands', that is ventures established in recipient States and are then operated exclusively by non nationals, whether such ventures are subsidiaries[754], turnkey plants, assembly plants, etc.

The Code's examples of what constitutes an international technology transfer contract do not explicitly show that the element of acquisition by the recipient of technological capacity in the technology acquired, in addition to the sale of a technological right, is what constitutes a transfer. It is because of the omission of explicit reference to the learning or development aspects (demand satisfaction) of the transfer in the definition, that subsequent consideration of the issues of restrictive practices, `un-packaging', etc. can be criticised as unrelated to the primary objectives of the Code. Examples given under the Code have therefore to be viewed with this omission in mind.

Paragraph 1.3[755] enumerates examples of international technology transfer transactions. These include assignment, sale and licensing of all forms of industrial property except trademarks, service and trade names[756]; provision of technical expertise in all forms including feasibility studies, designs, personnel training, etc. While the examples include the acquisition, installation and operation of plant and equipment to any level,[757] the effective participation by nationals in such transactions and the resultant acquisition and assimilation of transferred skills is only presumed.

The universality of application of the Code, that is, its international scope is set out in paragraph 1.5,[758] thus reaffirming the applicability of the Code beyond a "North - South" dimension, or specific *techno-economic*, social or political systems. Some member countries to the negotiations proposed inclusion in the Code, whenever reference is made to "States", "governments" or "members of UNCTAD"; regional groupings of States to the extent that they are competent. Such inclusion would enhance the position of regional groups to have regional regulations related to the subject dealt with by the Code, "incorporated" into the Code as existing international law or norms. Unless the regional laws take into account the collective interests of all States,[759] the potential for conflict is obvious.

7.4 Objectives and Principles (Chapter 2)

The general objectives and principles under the Code are agreed. However, specific issues, referred to, especially in "hard - soft" law terminology, as fundamental, remain unresolved.[760] The Code aims at establishing general and equitable legal norms and standards for the regulation of international transfer (and development) of technology transactions.[761] To accomplish this objective, special notice is given to the needs of LDC's. Fundamental differences have increasingly been papered over in this area, especially due to the failure to separate general from specific issues coupled with the declining negotiating and bargaining powers of developing countries as consumers of international technology flows.[762]

To promote mutual "confidence" between the parties and their governments[763] there is a call, among others, for the improvement of the *bargaining position* of LDC's, and avoidance of abuse of stronger position by developed countries. An

improved bargaining position for LDC's would result, inter alia, from the reduction of technological disparities between States, for example, through encouragement of enterprises to undertake adequate research and development in host LDC's, facilitation of effective equity participation in joint ventures by LDC nationals, etc.[764] The Code also requires all States to promote LDC participation in world production and trade,[765] through inter alia, facilitation of LDC acquisition of technology on fair and equitable terms or on special terms and conditions for the least developed among them. It has been incorrectly asserted[766] that the call for preferential treatment for LDC's to promote their increased participation in `world production and trade', imports the market idea into the Code. As already stated, a Code for the regulation of international development and transfer of technology does not deal with exclusive `sale or purchase' transactions but with the *transmission of technological capacity.*

7.5 Establishment of Principles - Universality, non Conditionality, Consent, non Coercion, etc.

The important principle of universality is comprehensively set out under paragraph 2.2 (i). Under the sub paragraph, States would be allowed the right to adopt all appropriate measures to facilitate and regulate the transfer of technology in a manner consistent with international *obligations*,[767] under mutually agreed, fair and reasonable terms and conditions. The reference to international obligation is the result of compromise. Developing countries objected to the use of `international law' as a standard since such international law in reference to technology transfer would imply incorporation of many of the current standards and norms, norms and standards which are

not representative of the wider interests of the new international community and which the Code therefore seeks to replace. However, implicit recognition is given to the above mentioned need to apply international law to development related aspects of international technology development and transfer transactions alongside continued application of national laws and regulations to fundamental development issues.

In implicit recognition of the need to safeguard primary (technological) development needs of developing countries, the Code outlaws use of *conditionality* through express recognition of the techno - economic, social and political independence of States.[768] The members are to co-operate according to the science and technology goals contained in the Charter of the United Nations,[769] especially where those goals are a precondition for the establishment of the NIEO.[770]

7.6 Identification of Responsibilities and Obligations of parties

7.6.1 National Regulation (Chapter 3)

National regulation of international technology development and transfer agreements is now a well-established legal right.[771] The Code, like other multilateral instruments that contain "minimum norms and standards" or general guide-lines, has to rely on mixed jurisdictional implementation.[772] The Code however provides general guide-lines which are a distillation of existing internationally agreed legal principles and policies relating to international technology (development and) transfer. If followed, the guide-lines should facilitate the extension of international

legal norms and standards to cover international technology (development and) transfer agreements by facilitating the creation of a mixed jurisdiction framework.

The code attempts to convert already agreed international legal principles and policy relating to international technology transfer, as set out in various international resolutions and decisions and elaborated in States practice[773] into legal norms and standards. *Through the national regulation provisions, the Code recognises the inseparability of joint national and international implementation of any international norms and standards that would be agreed.* Paragraph 3.2 (vi) reiterates the need for all States operating regulatory schemes to operate them in accordance with their "international obligations". Decisions made by competent authorities should be fair, equitable and applied on the same basis in accordance with established procedures of law.[774] Again, implicit recognition is given to the identification of fundamental development goals which technology importing States have full sovereign rights, recognised under international law, to regulate. International obligations apply in the first instance to any issue beyond these fundamental or primary areas of recipient States' competence.

Because technology importing States must give adequate guarantees to protect technological rights of non - nationals involved in technology development and transfer activity on their territory, the Code promotes the application of the principle of transparency. In accordance with this principle, host States are required to ensure ready public availability of clearly defined laws and regulations.[775] The principle is covered, "implicitly", by provisions under Paragraph 3.3. The sub paragraph provides that while host States should take into consideration their socio-economic development when adopting legislation for the protection of industrial property, they

must also ensure effective protection for all rights recognised under international law and regulation.

7.6.2 Restrictive Business Practices (Chapter 4)

The provisions under this Chapter have been referred to as the heart of the Code, or the basis for acquisition of international support for the Code.[776] Developing countries promoted the inclusion of provisions on restrictive practices under the Code on the grounds, inter alia, that lack of provisions on such practices (RBP's) under the Code would imply the inapplicability of general norms or guide-lines to the regulation of `restrictive practices' occurring during international technology transfer transactions, thus validating the need for direct multilateral rules (derived largely from competition and anti - trust regulations of developed countries) for the regulation of such practices. Such a position would correspond to that provided for under the Set of Mutually Agreed Equitable Principles and Rules for The Control of RBP's, which are "voluntary" based and have proved ineffective in regulating RBP's. Developing countries, supported by UNCTAD experts, stress that adoption of the derived Set has not resulted in any effective action for the elimination of generally restrictive practices, especially by developed countries.[777]

However, the issue of restrictive practices, as noted above, must be approached by considering whether the practice in question obstructs or frustrates international transmission of technological capacity to developing State's nationals in question and whether, in general context, the practice is contrary to the declared United Nations aim of promoting access to science and technology for all nations and peoples. Given this approach, it is possible to develop criteria for

distinguishing practices which are contrary to primary developmental interests from those legitimate practices which aim at promoting and protecting technical, commercial, financial, etc. efficiency or capacity in the recipient State.

Due to the non distinction between primary development rights (for example, acquisition of technological capacity in the relevant technology) and development related rights, specific and general practices, the debate between developed and developing country parties on the issue of restrictive practices, though protracted, has not resolved the issue of what constitutes an RBP or what criteria are to be applied for control of such practices. The Code lists specific practices such grant-back provisions, non challenges to validity of technological rights, exclusive dealing, restrictions on personnel use, research and adaptation, price fixing, exclusion sales or representation agreements, restrictions on publicity, post contractual obligations after expiration of industrial property rights, export restrictions, etc. as per se, restrictive.[778] As seen below, references to `adverse effect' on national economy or `restrictive of development' are too general and thus hard to define or implement. Equally, continued non multilateral regulation is legally indefensible.

To illustrate the inadequacy of both existing approaches, the example of a Code prohibited provision, that is, grant-back provisions, may be used. Grant-back provisions are, inter alia, requirements by the supplying party or his agent that the recipient `pass back' too the supplier, any improvements to the technology supplied to the supplier, without charge for such improvements. Grant back provisions form part of the common legal armory deployed by enterprises, commonly TNC's, to gain and retain control of state of the art technology - intensive, patent, design or copyright protected product lines.

According to an UNCTAD study where such rights are fully controlled by the supplier, such supplier can prevent the recipient from obtaining competing technology, entering into sales or manufacturing agreements, etc.[779] Disagreement exists as to whether the practice should be deemed acceptable if:

(i) The provision is not exclusive of third parties, that is, if the recipient can sub licence, assign or sell improvements to third parties without restriction;

(ii) If reciprocal obligations are undertaken by the supplying party;

(iii) If such conditions would not result in the abuse of dominant market position by the supplying party,[780]

(iv) If the contract involves new technology which the supplier is still in the process of developing or refining;

Even from this single example and resultant issues, it becomes apparent that practices may not always be classified legal or illegal without specific reference to a recipient state's level of technological development, the technological and related negotiating and bargaining powers of the direct parties, the scope and effect of the restriction, etc.

Failure to agree, under the Code, as to what constitutes an RBP, is assumed by some scholars to be a reflection of a `fundamental ideological and juridical' divide between the parties. In the original drafts,[781] the Group of 77 gave the criteria for determination of restrictive practices and arrangements involving the transfer of technology as those with adverse effects on the national economy of the recipient State or those limiting the development capabilities of the receiving country. Such

practices were subject to national regulatory legislative control. Group B insists that their juridical and administrative experience[782] with regulation of restrictive practices shows that only in a few cases could such practices even when defined, be prohibited or effectively controlled through legislation.[783] However, it is useful to note that competition and anti-trust laws, regulations and precedent do not allow the use of general practices that are restrictive of `competition' or efficiency, that is, the factors responsible for continued growth and development in developed countries.[784]

Other outstanding issues in this area include those of regulation of transactions between affiliated enterprises, especially as to whether national legislation should be the exclusive legal mechanism for the regulation of intra firm practices deemed restrictive, whether the test of reasonableness should be applied in determining whether a practice is restrictive or not, etc.[785] With regard to intra firm transactions (for example, patent pool or cross licensing agreements, that is agreements that contain restraints on territory, quantity, prices, marketing etc.)[786] the Group of 77 holds that for purposes of scope of application of the Code to such transactions, the holding company or head office of the transnational corporation (TNC) and its subsidiaries form different units. Group B countries which claim competency to govern the legal internal affairs of corporations whose principal office is located in their jurisdiction and to command the allegiance of the nationals who run such corporations,[787] holds the view that equal treatment for foreign held subsidiaries and local enterprises in relation to technology transfer transactions within the TNC should be accorded the same treatment as transfers between local firms in a host State.[788] For example, in cases where technology is supplied by a subsidiary under a transaction involving restrictive practices, if technology causes, for

instance, serious environmental damage, the host State would be expected to want to sue the subsidiary as a joint entity with the head office, while the home State would encourage the denial of liability by the head office for joint liability with the subsidiary.[789]

It was suggested by Group B countries that to define restrictive practices, the un-ratified Havana Charter[790] provisions on the subject should be resorted to. The standard set in the Charter defined restrictive practices as those which affect international trade, restrain competition, limit access to markets or foster monopolistic control or have harmful effects on the expansion of production or trade.[791] The Group of 77 has objected to this standard as too narrow, being derived from developed countries' anti-trust and competition laws and regulations and reliant on international trade `effects' criteria that do not take into account primary development needs. Though not ideal, the unratified Charter provisions which dealt with, among others, monopolistic international trade by firms,[792] prevention by agreement of the development or application of technology or inventions, whether patented or not, abusive use of granted rights such as patents, trademarks, industrial designs or copyright, etc. could be modified to meet current and future needs, especially if they are re-framed to take into account the transmission of technological capacity as a primary development goal.

In conclusion, the current Chapeau is inadequate as a framework containing basic norms for the regulation of restrictive practices since it is preoccupied with outlawing specific practices rather than the streamlining of multilateral objectives of States with those of private parties and non governmental organisations. Paragraph 4.1 requirement that the parties `voluntarily' avoid certain

practices that are "unduly restrictive"[793] or those which unduly restrict international technology transfer flows, can hardly promote the evolution of international legal norms and standards in this area.[794] It may be reiterated that rather than adopt general voluntary standards, it is necessary to set criteria for distinguishing between general and specific practices, between their effects and form[795] and for determining the compatibility of a given practice with the eventual reduction or elimination of material (especially technological) inequalities between States.[796]

7.7 Legal Status of the Code

Continued negotiations on the Code, in line with the decline in the negotiating and bargaining power of developing countries, have been possible only on the grounds that a future Code would be voluntary. The group of 77 originally insisted on a binding Code or one adopted through a final Act of the Conference and endorsed by the General Assembly,[797] but this position has been gradually abandoned.[798]

The unwillingness to adopt the Code as a binding instrument may point to at least three factors. Firstly, lack of effective will, *in practice,* by technology exporting States, to extend international law to the entire international technology transfer process. Secondly, the concession by the parties that any resultant instrument must depend for its implementation on joint national and international jurisdiction.[799] Thirdly, the anxiety of some of the States parties to disassociate the Code from legal authority which could be implied from a multilaterally negotiated instrument.

The current draft Code is in legal content, a broad compromise which in practice would allow parties to interpret most provisions according to their perceived

interests. The need for a compromise instrument was stressed by a representative at the sixth conference (with approval by the conference) thus:

> "it was not a treaty that was being negotiated but a Code of Conduct that is, a non binding instrument seeking to place a maximum of useful elements at the disposal of the parties to the technology transfer transactions in their contractual relationships -- unlike a treaty, a number of positions could be included to reconcile divergent positions".[800]

Such views indicate lack of understanding[801] of the processes through which international law norms are created in organised international society, that is stress is laid on the binding and non binding provisions in instruments.[802] Further, such views are based on the assumption that the Code negotiations are a unilateral attempt by developing countries to impose new international legal duties on owners of technology. From discussion in previous Chapters, clearly, some duties or obligations such as the obligation to offer preferential, fair and favorable or special terms and conditions for access to technology by LDC's, the need to eliminate general restrictive or coercive terms and conditions in international technology development and transfer arrangements, the duty to strictly comply with primary development goals of developing countries by non nationals, the duty to maintain a transparent national legal framework for the regulation of international technology development and transfer is compatible with international law, etc., are already established international obligations.[803] Further, it is now established that *absolute free market and contract* principles should, in international relations, be promoted exclusively between parties of equal or comparable bargaining power. A preliminary conclusion is that the adoption of a voluntary Code based on general duties or obligations of moral authority or which outlaws specific

practices "across the board", will not facilitate the extension of international law to cover the entire international technology transfer process, that is, through the establishment of international legal norms and standards on the subject. Neither would such a Code enhance the reduction and mitigation of bargaining and negotiating power disparities between parties or prevent the growth of further technological disparities between States. It is therefore essential that an adopted Code, even if of voluntary legal nature, should include specific principles, standards and criteria for the regulation of international technology development and transfer activity which are already well established through multilateral and multi-bilateral practice.

7.8 Transfer and Development of Technology and Private Technological Property Rights (Chapter 5)

Some of the obligations envisaged in this part of the Code, according to their original sponsors, are based either on principles or norms of international *socio-economic* justice (a continuing subject of international legal controversy,[804] especially under the soft - hard law debate) or derived from traditional international law principles. The result is a set of principles whose probable effect is difficult to assess.

The Code sets forth obligations and duties that are addressed to all "parties" to international transfer transactions, including States acting under a purely commercial status (*iure gestionis*). The Chapter is primarily aims at safeguarding private property rights against "arbitrary" or discriminatory States action. In return

for guarantees of fair and transparent treatment by host (and home) States, private suppliers of technology are:

(a) Required to respond to the economic and social objectives of both the host and home States;

(b) Observe fair and honest business practices;

(c) Take into account the stage of technological development of the recipient and technical capability of such party;[805]

(d) Guarantee, among others, that the technology supplied is suitable for use, obligations and rights are divisible (including unpackaging of technology),[806] disclosure of any information which would show that the technology supplied if used in accordance with the terms and conditions of the proposed agreement would not meet with particular health and environmental requirements.[807]

The recipient's duties include:

(a) Respect for "confidential information" during negotiations and performance of the contract;[808]

(b) Observance of quality levels agreed upon, preservation and promotion of the suppliers existing "goodwill";[809]

The chapter also stresses pre-contractual relations of parties, a stage of the technology transfer transaction that has increasingly been noted by recipients to be vital to the determination of consequent entitlements.[810]

The Code calls on the parties to negotiate in good faith with the aim of reaching, in a timely manner, agreements based on "fair and reasonable commercial terms", including the price.[811] During the contractual phase (lifetime of the

contract), the acquiring party is to accord to the supplying party, access to improvements made to the technology supplied -paragraph 5.4(i). As we saw above, the LDC's stress that to ensure balance of commitments, the supplier should provide reciprocal rights to the recipient in return for the right improvements. The supplier should offer, among others, minimum guarantees of technical assistance, training of personnel, adaptation, etc.[812]

7.9 Preferential Treatment for Developing Countries (Chapter 6)

We have already pointed out various ways in which the Code tries to promote technology transfer to developing countries. The inclusion of the Chapter in the Code reaffirms the recognition by the negotiating parties of the obligation to accord preferential treatment to LDC's as technologically unequal sovereign States.[813] However, despite commitments made in principle by developed countries to promote the extension of international law to the entire international transfer and development of technology process,[814] effective implementation of agreed principles and standards is curtailed by national interests.

The Code attempts, at State level, to improve the LDC's bargaining and negotiating powers vis-a-vis private parties by enlisting home state support. Developed countries are called upon to, inter alia, facilitate international technology (development and) transfer through various ways.[815] These include:

(i) Facilitating of access to information on availability, description, locations of technology;

(ii) Extending help to developing countries in order to enable them to assess and adapt technology under transfer, especially by giving access to scientific and industrial research data;[816]

(iii) Under paragraph 6.1 (ii) and (iii), developed countries are to promote the transfer of technology which is subject to private decision making and that which is not, etc.

All such measures, it is assumed, would cumulatively help to reduce the cost of transfer of technology and increase the technological self reliance of the recipient country. These goals are to be promoted, inter alia, through the reform of the legal and other regulatory institutions of developing countries -paragraphs 6.1 and 6.2 (vii).[817]

Paragraph 6.2 incorporates principles developed under the United Nations Technical Assistance Programme.[818] This implies that contracts for the transfer of technology must be fairly negotiated, provide for full participation by LDC nationals. Requests for experts, training of local personnel in research engineering and design, administration of laws and regulations (especially for environmental safety protection), project support, etc. are to proceed from the host or recipient States, which pays the local costs for establishment of the project.[819] However, South - South technology transfer (mutual self help measures) receives little attention under the Code.

7.10 International Institutional Machinery, Implementation (Chapter 8)

The Code negotiations point towards the establishment of a *'framework treaty'* type of Code, that is a Code that would enable the setting up of institutions or arrangements by or in accordance with which decisions regarding the international development and transfer of technology can be taken on behalf of all States. Because of the complicated and dynamic nature of the subject matter under the Code, many issues will have to be determined in time, according to changing circumstances and the developing, dynamic relationships between parties. Consequently, the framework set up under the Code, is a non judicial institutional machinery, that is, an intergovernmental group of experts who are to act as the institutional machinery within the UNCTAD frame work, making operating decisions which add to or alter the rules now being agreed.[820] The intergovernmental Committee would in practice, subsume and expand the functions of the UNCTAD Committee on transfer of technology.[821] Though the Committee's competency would be limited to that of UNCTAD, the institution of the intergovernmental group would give the new machinery an international aspect reinforced by consensus. It would therefore be in a better position to exercise "facilitating pressure" than the existing Committee which has a very general mandate, though continuity would be achieved and the experiences of the current Committee passed on to the new body.

The Committee would on formation undertake to, inter alia:

(i) Gather relevant data on transfer of technology and carry out necessary studies for the promotion of such goals;

(iii) Assist in the implementation of Board decisions and carry out coordination activity with other UN agencies:

(iii) Persuade members to undertake appropriate steps to meet their obligations under the Code;, etc.[822] However its activities would not include any formulation of substantive policy of a juridical nature on any issue, as is expressly provided for under paragraph 8.2.2 of the Draft Code. The Committee would also undertake periodic studies and research in order to provide information to member States and increase exchange of experience, thus enhancing the application and implementation of the Code's provisions.[823]

A voluntary intergovernmental procedure for consultation and conciliation[824] would be the main mechanism for the settlement of any disputes as to the interpretation of the Code provisions due to the lack of any jural authority by the intergovernmental committee. The Committee would help to disseminate information on agreed international legal principles and policy relating the development and transfer of technology. Dissemination and consultation would assist the parties, in addition to the settlement of technology development and transfer disputes, to harmonise national laws, especially through incorporation of the agreed standards and principles. The Committee would not be empowered to give hearing to private parties in their individual or organisational capacity, though past UNCTAD and United Nations practice points toward the gathering of and dissemination of views, opinions, etc., by he Committee through consultation with the private parties. Consultation with private parties is very essential in implementing multilateral Codes of Conduct or guidelines dealing with new and complex subjects, as past practice indicates, that is application of international guidelines to private parties can only

be improved if the Committee's opinions on behaviour or action by an individual enterprise deemed contrary to the Code or guidelines takes into account the specific views and practices of such parties.[825]

7.11 Law Applicable and Settlement of Disputes (Chapter 9)

States have a sovereign right and jurisdictional autonomy to apply legal regulation to the evaluation, approval, negotiation of contract terms and conditions to be observed by parties to international technology transfer transactions. In principle, the consequences of such rights is that technology transfer contracts must not contain terms or conditions that are contrary to the *odre public* of the host States[826] and that the host States can require exhaustion of local remedies or exclusive application of its own laws and regulations to any transaction undertaken on its territory or within its jurisdiction. However, these rights increasingly have to be exercised in accordance with international law obligations and duties.

Initially, the theoretical power of States to exercise complete legal control over international technology transfer transactions underlay the impetus to negotiate and conclude a Code of Conduct for the transfer of technology, in both home and host States. Home States, especially for transnational corporations, required a voluntary Code that would, among others:

(1) Promote transparency in national laws of host States;

(2) Promote non-discriminatory, and equal application of national laws and regulations to technology transfer transactions;

(3) Guarantee `free choice' of law for performance of agreed obligations and settlement of disputes arising out of technology transfer transactions;[827]

(4) Exclude purely commercial aspects of transactions, such as price and terms of payments from regulation under public policy rules, etc.

For developing countries, the position in relation to choice of law and settlement of disputes were almost opposite. The major aims of developing countries on this issue included:

(a) The prevention of `internationalisation' of contracts for the transfer of technology, that is, the determination of all rights and obligations under `freely' negotiated contracts in a forum selected by the dominant party when the parties are grossly unequal in bargaining power.

(b) To ensure that contracts and agreements for the transfer of technology conformed to national public interest and development (especially technoeconomic) requirements;

(c) The need to guarantee States autonomous decision making and ability to pass and enforce its own laws and regulations - the Calvo Doctrine position - and govern technology transfer transactions *by the law that has the most significant connection or forms the centre of gravity of the transaction*, that is, that of the host States where the technology development and transfer contract is performed and on whose territory the effects are felt, etc.[828] Though lack of concensus still prevails between the negotiating groups as to the proper law applicable and the correct forum for the settlement of disputes arising from technology transfer transactions, original absolute autonomy positions have been gradually modified, largely against the developing

countries.[829] Developing countries position shift has not only been due to weakening of their negotiating and bargaining power but also due to extension of emphasis beyond performance and post performance rights and duties to include effective pre-performance of agreed obligations. Consequently, apart from pecuniary or immediate cost of transferred technology, improved legal and technological assessment in developing countries now includes other factors such as the nature of the technology supplied, the ability of the supplier to effectively transfer technological capacity to the recipient, promotion of specific vital sectors, environmental and health preservation, etc.[830] An increasingly practical consideration for the compliance with international law in dispute settlement issues, particularly in the least developed countries, is that of `instrumentality', or the use by a developed country based technology supplier who holds an arbitral or other award, of procedures which secure payment from a home State insurance or export credit scheme.

However, improved participation in contractual forms of technology transfer, such as joint ventures, co-production and specialisation arrangements, etc. by developing country nationals, except in the least developed countries, has reduced the pressures to internationalise contracts. As discussed in Chapter V, mixed jurisdiction now provides a more practical frame work for the resolution of issues that may arise under a technology development and transfer contract. The Code therefore promotes, inter alia, resort to channels that already encourage application of international law by choice or exhaustion of national remedies, for example, under United Nations Convention of the Recognition and Reciprocal Enforcement of Foreign Arbitral Awards.[831]

A tentative conclusion would be that choice of law and mode of dispute settlement are increasingly less contested between the two groups of negotiating States, due especially to changes wrought by States practice.

7.12 Conclusion

The need for extension of international legal regulation to cover the entire international transfer and development of technology process is undoubtedly critical. The opportunities presented to States, *via* the Code negotiations, to provide at least minimum international legal norms and standards, were initially wasted by the negotiating parties assuming absolutist legal stands, often divorced *from* States *practice and even already agreed international legal policy and principles.* The stands were antagonistic to the adoption of an instrument capable of promoting the evolution of a legal regime are largely due to the parties failing to perceive that a *'framework type treaty'* is required rather than *static treaty law.*

Further, because the main negotiations were based on the formulation of a 'treaty law' type of agreement, many issues were erroneously regarded in a static framework and as requiring *permanent* legal rules for their resolution. Among those issues most unsuitable to a static rule approach are:

(i) The conflict of interest between private property holders and LDC host States, especially with regard to restrictive practices, protection of private intellectual property rights, price of technology;

(ii) The effect of incorporation of a preferential treatment standard in the code,

(iii) The effects of `internationalisation of contracts' in regard to their negotiation, performance, settlement of disputes, etc. or choice of law and forum;

(iv) The need to avoid institutional machinery with any juridical powers to admnister the Code's provisions, even though it is a fact the the Code is not meant to be and cannot stand as a single instrument for the regulation of the entire gamut of inter relationships in international development and transfer of technology transactions;

(v) The need to maintain the `traditional' subjects addressed by the Code as State actors only;

(vi) The need for a Code that would only contain general voluntary and nationally implemented rules and standards;

(vii) The extent or scope of any specific duty or duties to be under taken by home States.

CONCLUSION

C.1 Legal Regulation of Inter State Technology Development and Transfer - A Global Problem ?

Until recently (post 1970's), technological development and transfer was viewed as a problem exclusively affecting developing countries, that is, developed countries viewed it not as a problem of international interdependence but one of national choices, legal and non legal. However, with continued growth of the organised international community and the increasing centrality of international technology development and transfer in inter State relations (basically due to the central role of technology in national development and growth) the legal responses to inter State technology development and transfer are increasingly multilateral, institutionalised and intended to employ the whole gamut of legal intervention mechanisms such as *good offices, mediation, conciliation, consultation, negotiation, arbitration, litigation and progressive development of law (for example through framework treaties and State practice in multilateral organisations).*

During the course of this work, we have attempted to illustrate how the organised international community can extend and has extended legal relations vis-a-vis non legal or unregulated relations in international development and transfer of technology. However, though developed countries have in principle undertaken multilateral commitments which in effect extend legal regulation to inter State basic technology development and transfer activity, the same States have, apparently, due to *non legal national commitments*,[832] obstructed the multilateral and multi-bilateral

implementation of resultant commitments. Because of this divergence between multilateral legal and national, essentially non-legal commitments, developed countries have followed a convenient hard - soft law approach that facilitates denial of the existence of inconvenient norms or assertion of the presence of a legal obligation wherever the national interest is not adversely affected.[833] This argument is not rhetorical for we illustrated (Chapter 5) that developed countries' member to the OECD have developed a quasi- legal regime with reference to regulation of inter - State transactions between firms, including the firm's technology development and transfer activity. Even "new" or proposed legal arrangements among developed countries themselves reflect this dichotomy between the recognition of interdependence goals (such as technology development and transfer) whose fulfilment is a precondition for maintenance of material (and increasingly juridical) equality between states and national absolutist claims. This point can be illustrated by reference to the technology development and transfer arrangements under the proposed "Maastricht Treaty".[834]

Under the proposed Maastricht treaty research and technological development provisions, the European Community aims to strengthen the scientific and technological bases of Community industry and promote its competitiveness at international level - Article 130f. The legal measures to achieve this objective would include:

> (i) Definition of common standards and removal of legal and fiscal obstacles to joint technological, research, development and co-operation - Articles 130f (2) and Article 130g (b);

(ii) Co-ordination (inter State) of technology research and development policy - Article 130 (h)(i);

(iii) Adoption of institutional measures and instruments, that is, multi annual framework programme to be adopted by the Council of Europe in order to determine and set objectives - Article 130 (i), disseminate results - 130 (g), determine rules of undertakings, research centres and universities and lay down the rules governing the dissemination of research results - Article 130 (j), adopt rules for governance of dissemination of knowledge and dissemination of research results by other member States -Article 130 (k) and promotion of participation in structures (such as joint undertakings and technological institutions) - Articles 130 (l) and 130 (m).

(iv) The joint undertakings and structures necessary to implement Community research and development policy would be set up by the Community - Article 130 (n).

These proposed technological `interdependence' legal measures and standards, like similar provisions in other areas of the Treaty, aim at promotion of joint technological development and research within the Community (that is, with equal participation for all members, guarantied through preferential measures for the weaker States), are opposed by national interest `commitments' which has temporarily frustrated implementation of the proposed Treaty goals. This problem of `conflicting' commitments is magnified in the international multilateral framework involving developed and developing

countries, where developed States re-interpret commitments to satisfy non legal national interests.

The point made immediately above is that promotion of international technological development and transfer through legal means and within the context of interdependence, though now a permanent feature of inter State relations, is obstructed by non legal principles, measures, rules, etc. which reflect interdependence and balance of commitments, for example, transparency and accountability, preferential treatment, divisibility of rights and obligations, etc.

The purpose of this work has been to lay out those international legal principles, standards, institutions, measures, etc. that organised international society, whose future development and growth is technology centered, has deployed to promote the transmission of technological and scientific capacities between States, especially between developed and developing countries. Without further application of multilateral legal solutions to promote transmission of technological capacities to LDC's, there would be no achievement of `*normalcy*'[835] among States with a resultant future lack of even juridical equality between LDC's and developed countries, (as indicated by the present lack of material equality between developed and developing countries), with a consequent collapse of (the) organised international community.

C.2 The Multilateral and Multi - Bilateral Legal Responses to the Problems of Technological inequalities between states, Evaluation The Traditional Framework

We saw, in Chapter II that the traditional multilateral legal framework for the regulation of inter - State intellectual property flows, governed principally under the WIPO administered Conventions, that is, the Paris, Berne and UCC Conventions, does not operate in accordance with balance of commitments and consequently entitlements. The imbalance between rights and obligations of technology owners and LDC's primary development interests therefore persists. The static traditional treaties therefore fail to meet the needs a large group of technologically dependent countries. The principle weaknesses we identified in the regime include:

Patents and related rights

(a) The Paris Convention being inherently aimed at defining (private) intellectual property rights and standards for their protection *vis-à-vis* the primary (technological) development interests of developing countries and the general public interest, is balanced in favour of technological rights protection. Consequently, developing countries are constrained in their sovereign right to, *inter alia*:

(i) Enforce exploitation of protected rights to ensure technological development;

(ii) Encourage local innovation, research and development of technology, by, among others, enforcing local exploitation, for example, through issue of compulsory licences or excluding from

protection of certain `products and processes', prevention of import and local exploitation of hazardous technologies, etc.

(b) The maintenance of `absolute' and abstract legal principles such as reciprocity, national treatment, exclusive rights, etc. which causes, inter alia, virtual absence of provisions or mechanisms in the Paris Convention to correct technological and material inequality between States. This encourages, among others, importation as exploitation, disregard for inequality in bargaining and negotiating powers between LDC nationals seeking to select, acquire, adapt or develop foreign owned technology and related know how, and owners of such rights who are principally, developed country nationals.[836] It also promotes use of indivisible technological rights, for example, patent, trademark. copyright industrial designs `packages', general restrictive practices, etc. by technology owners.

Copyright

(a) The Berne and UCC Convention's provisions on preferential terms of access for developing countries to intellectual property works, for example, through compulsory licensing of rights of reproduction or translation, are defeated by the deliberate complexity of their provisions which are meant to preserve high levels of protection for private intellectual property rights. Consequently, unlike the unlike the ratified Stockholm Protocol, the UCC revised provisions and the Berne Appendix are conditioned and balanced against LDC's to the extent that very few developing countries have been able to use the compulsory licensing or other `facilitative provisions; found in the Conventions.

some of these and other weaknesses, especially detailed in Chapter II above, were to be eliminated through further revision of the Conventions. However, as explained in Chapter VI, developed countries, under largely non

- legal pressures, have sought to halt or reverse further reform of the WIPO administered Conventions (thus negating their multilateral commitments and obligations) by instituting "new" reforms under GATT. The GATT based reforms are detrimental to developing countries' technology development and transfer goals because they seek to promote trade related aspects of intellectual property rights, a development related (commercial) goal, as overriding technology development and transfer policy of developing countries, a primary development goal, that is, they require developing countries to undertake commitments that effectively cause an imbalance in commitments.

Specifically, the GATT reforms aim, *inter alia,* at increasing standards of protection for intellectual property rights, for example, through greater duration of protection, that is, 20 years and extension of the Paris Convention's definition of working (currently territorially defined) to include importation. The reforms would restrict the right of states to determine the nature and scope of rights they grant by, *defacto,* linking exercise of sovereign rights to promote technological growth and development to international trade, investment, finance and other *conditionalities*. Thus for example, use of local trademarks alongside foreign owned marks, which is illegal under the national law of some technology exporting states, would render the authorising state liable to "trade measure" retaliation, creating a condition where *techno-economic* development in LDC's would be subject to control by technology exporting states.

Further, the reforms, by extending periods of non use, uninterrupted or not, before cancellation of patents, trademarks or other rights (especially by allowing owners to resort to subjective "valid reasons" to justify non working) would further restrict developing countries' ability to enforce local technology development regulations against technology owners who are non nationals. Such restriction would apply especially to disclosure of inventions, local working requirements, lack of use or inadequate use of patented inventions, use of "indivisible rights" packaging and general restrictions on technology recipients by owners of technological rights.

In short, the reforms, if implemented, would curtail the developing countries' right to apply the intellectual property system as a "defensive" mechanism against further restricted international access to industrial property available in developed countries, a right that is inherent in the concept of sovereignty and is preserved by territoriality provisions and long standing practice of all countries. Such an outcome is contrary to the requirements of *interdependence* and balanced commitments, that is, because a country's interest in international protection of IPR's depends largely on the size of its own intellectual property pool, the contribution of foreign owned intellectual property (rights) to its *techno-economic* and social cultural development as well as the perceived goodwill of other states.

C.3 The Alternative Option, the Organised International Legal Community, Progressive Development of Law and International Transmission of Technological Capacity to LDC's

As already noted, we reject the "radical" approach to international legal problem, that is, the suggestion of alternative "absolute" remedies such as the mandatory exercise by developing countries of their sovereign powers to guarantee technological development or the unilateral adoption of legal measures regardless of their extra- territorial impact or their effect on balance of commitments and thus entitlements.

We therefore took the approach to new and complex issues that has progressively been adopted under the organised international community, that is, the employment of the whole gamut of international legal "intervention" mechanisms, that is, *from good offices, mediation, conciliation, consultation, arbitration, litigation, and gradual evolution of law* to resolve perceived problems of a multilateral character and impact. These legal measures are applied through permanent international forums or institutions, with the intention of effecting the *extension* of international legal backing towards that state or states whose claim most accords with *interdependence, respect for sovereignty and preservation of international peace.*[837] In relation to the transfer of technological knowledge and skills to developing countries, the multilateral framework encourages developed countries to pay for technological knowledge and skill flows to developing countries as a measure of guaranteeing future international co-operation and peace.

Consequently, we discussed the legal measures (which are of a multilateral or multi-bilateral character) that the organised international community has evolved, within permanent international forums and their interaction with State practice, to address the need of developing States for technological and scientific knowledge. These legal measures, institutions, instruments, etc. are not primarily, meant to promote or *enforce legalism or claims of absolute sovereign or exclusive rights*, by any State or private party exporting or importing technology.

Using the example of the UNDP multilateral framework, we illustrated, inter alia, that:

> (i) Multilateral measures, principles, institutional mechanisms, etc. are strictly preserved and aimed at promotion of collective international goals, *especially the elimination of technological and scientific disparities between States*, thus promoting future independence and interdependence of all States, preservation of international peace, etc. in accordance with the goals of the new international order.
>
> (ii) Governments `importing' technological know-how and skills exercise their sovereign rights to safeguard primary developmental goals, that is, in this context, developmental policy with regard to acquisition of technological capacity. This goal is achieved by extending *formal legal measures and instruments to the entire process* of request for and offer of multilaterally sponsored technological knowledge and skill flows, negotiation and implementation of resulting (international technological co-

operation) agreements, guarantees of transparency and accountability, adequate review monitoring and evaluation, equal participation by all parties, etc.

(iii) Promotion of preferential treatment for developing countries and special measures for the least developed among them to ensure, inter alia, that LDC's acquire technology without coercion and terms that mitigate or eliminate bargaining and negotiating power disparities, for example, by providing a negotiated, transparent and formal legal framework that regulates the terms for supply of skills to developing countries by all parties both public and private, and especially ensure that private party suppliers of technology participate positively in the technological development of host States.

(iv) Specific regional, sub regional and national multilateral legal instruments measures are taken to promote mutual co-operation and collective self help among member States.

We then showed the extent of incorporation of the various international legal principles, rules, practices, etc. such as interdependence, equal participation, transparency, preferential treatment, that have developed under the framework treaty type arrangements under the programme and its related agencies practices and decisions relating to international technological co-operation, into similar arrangements at the regional and sub regional levels such as the Lome Convention and Andean Pact arrangements.

Discussion of these arrangements revealed that, in the case of the Lome Convention arrangements;

(a) Though the legal principles as applied within the multilateral framework are adopted, in principle, under the Lome technical co-operation arrangements, in practice, they are inadequately implemented to promote technology development and transfer to ACP States. This arises not out of inherent shortcomings in the multilateral legal solutions but due to the peculiarities of the Lome Convention arrangements, that is, the Convention inter alia:

(i) Disguises command relationships under consent and multi-bilateral consensus, that is, the extreme technological disparity between the two `partner' groups can only be offset through comprehensive implementation of the legal measures under specific `permanent' mechanisms and institutions in which the ACP States participate equally and effectively.

(ii) Negotiation and implementation of arrangements between two groups of States with unequal negotiating and bargaining powers must contain inherent safeguards for the position of the weaker party. However, under Lome arrangements, ACP states have access to formal and legally binding channels, for example, to reject terms and conditions for `aid' set by the EEC. Politically, the ACP States may however state their case through the joint institutions, such as the Council of Ministers.

(iii) Through in principle preferential treatment is applied to all ACP - EEC technological and other co-operation activity, ACP States are required to offer national treatment to EEC enterprises,[838]

which diminishes the ability of ACP states to influence technology transfer and development activities of such EEC based enterprises undertaking Fund supported projects on ACP state's territory or regulate restrictive practices involving ACP- EEC enterprises, even if such practices obstruct, *inter alia,* acquisition of technological capabilities in the ACP state.[839]

There are few similar shortcomings under the Andean Pact arrangements which have more effectively, within a binding sub-regional framework treaty law, adopted and applied most of the legal principles adopted within the multilateral framework to promote technological parity and mutual self help amongst all members, that is, through a joint technological policy, specific safeguards and preferential measures. The Andean technological policy has, *inter alia*, promoted:

(a) Mitigation of bargaining and negotiating power between technology owners and Andean nationals;

(b) Transactional transparency;

(c) Payment of the correct and adequate price for technology acquired;

(d) More balanced *techno-economic* growth among the member states, thus preserving material equality amongst them, with a subsequent greater preservation of national sovereignties within a framework of interdependence and co-operation.

However, because the Andean joint technological policy was implemented jointly with a general foreign investment and international finance regime containing absolute sovereignty claim aspects, for example, in

relation to the law applicable to foreign investment, capital or technology development and transfer transactions being stated as limited exclusively to national or sub - regional law (referred to as the Calvo Clause),[840] the joint technological policy was perceived as based on national or sub regional legal principles contrary to international law. However, those elements of the joint technological policy that were in conflict with international legal requirements have gradually been modified to fit international legal requirements for balance of commitments and thus entitlements.

The modification process of national regulatory regimes through incorporation of legal principles, standards, minimum rules, etc. developed through state practice(either widespread or through permanent multilateral forums) was discussed under Chapter V in which we showed, inter alia, that:

(a) a general principle of balance of commitments, reflecting the wider principle of inter dependency, now underlies most of all the legal measures, institutional provisions, standards, rules or practices that have evolved during the era of organised international law, as applicable to international transmission of technological capacity to developing countries. Thus for instance, principles or standards such as transparency, accountability, preferential treatment, divisibility of obligations and rights (commonly referred as unpackaging, re negotiation, etc.)which discernibly modify the traditional principles of freedom of contract, caveat emptor, reciprocity, national treatment, non discrimination, or standards of compensation (the so called Hull formula)[841] all derive from or aim at guaranteeing balance of commitments among technology exporting and importing States, thus preserving balance of entitlements between non State parties.

(b) International law has gradually been extended to cover the entire technology development and transfer process through:

(i) Separation of primary (technology) development goals (to which absolute sovereignty applies) from development (technology) related ones which are primarily governed under international law.

(ii) Widespread and consistent compliance with transparency requirements by technology recipient governments, as promoted through the legal activities of multilateral organisations[842] such as UNDP, UNCTAD, WIPO or the various United Nations agencies including the World Bank.

(iii) Increased recognition of the need to offer technology to developing countries on equitable terms and conditions that take into account *negotiating and bargaining gaps*. In practice, this has meant that the majority of developing countries are offered technology on "fair and favourable terms" and the *least developed* among them (which face a greater negotiating and bargaining gap), are offered *special preferential* terms.[843] However, even though considered as an issue of inter dependence, the "graduation" of the most advanced LDC states from preferential treatment, even given a "sectoral" capacity in a technology by an LDC, is still "beyond" legal solution. However, taking UNDP practice as a yard stick, that is, *net contributor status*, it is suggested that preferential treatment may only be modified and not "eliminated" from international technology development and transfer activity involving advanced developing countries.

(iv) Incorporation of multilaterally developed legal principles, mechanisms, measures, etc. into national regimes has resulted into the development of a mixed jurisdiction regime that is substantively different in content and operation from the direct regulation statutes regime which was inherently absolute sovereignty based.

We concluded, inter alia, that the above process of incorporation through state practice has created more than candidate rules for future legal recognition, that is, the rules, standards, instruments, principles, etc. as they have evolved already form quasi legal norms, recognised as binding in practice. If extension of the rules, standards, principles, etc. as set out above were to follow the logical pattern of the norm formulation in organised international community, that is, the legal standards, rules, principles, etc. which are shown to be widespread[844] are incorporated into treaties, conventions or multilateral agreements; the formulation of an international legal and comprehensive document for the regulation of international technology development and transfer is natural. It is for this reason that we found a discussion of the Code of Conduct on the Transfer of Technology Negotiations, as a current and future logical step, inevitable.

The Code on Transfer of the technology would meet the need for extension of international legal regulation to cover the entire international technology development and transfer process. However, as stated above, legal development towards a Code has been slowed principally by:

(i) Developing country's initial insistence on a 'static' treaty law approach which fails to take into account the dynamic nature of international technology development and transfer relationships;

(ii) Developed country's rejection of a Code that provides a universal framework of legal rules and principles that contain normative flexibility and are institutionally 'continuously' implemented. The developed country's preferred 'voluntary based' Code would not meet the requirement that balance of commitments and interdependence be the starting points of reference for any legal provisions in this area.

The Code on transfer of technology is meant to meet the need for extension of international legal regulation to cover the entire international technology development and transfer process, that is, it is to be implemented as a 'framework treaty law or agreement'. As stated above, all states have now accepted the need to finalise such a 'framework treaty type' of Code.

A Code implemented as a 'framework treaty' type agreement or arrangement allows for flexible decision making and adjustment of agreed rules in accordance with *complex dynamic relationship*s and requirements. Implementation of the Code would be within an inter-governmental institutional machinery. Such machinery, even if of a merely quasi-legal character, would administer the 'framework' Code's provisions in a way that would be indispensable to the continuous evolution of rules, procedures and standards compatible with the legal regulation of complex and dynamic international technology development and transfer of technology transactions. Further, the Code 'institutional forum' would facilitate the gradual resolution

of issues of such a nature of legal participation by non traditional subjects of international law in a technology development and transfer regime, the nature of implementation of the Code rules and standards, for example, to guarantee that the technology `transferred' is adequately assimilated by recipients, adequate remunerated for technological rights owners, the extent of enforcement of any specific duty to be undertaken by home or host states, etc. Such an institutional framework would also facilitate legal interpretation of effects of Code related international activity, what specific or general practices are contrary to the promotion of international transmission of technological capacity, etc. while providing a `permanent' forum for discussion, monitoring of technology development and transfer related activity, dissemination of information, etc.

Lastly, a permanent institutional forum based on guaranteeing balance of entitlements and promotion of interdependence, would help to prevent unilateralism, including linkage of technology development and transfer, to international market access and international trade measures, thus promoting the eventual attaining of technological `normalcy' among States.

C.4 Summary of Conclusions

This work illustrates that technology is indeed now a separate and central factor in national and international development. We have argued that when technology transfer is defined as sale of technological processes, products, etc. there is often no actual effective transfer or development in

the host state. *The acquisition of a technological capacity by the recipient is the full and effective incorporation of the supplied technology by the recipient, enabling such recipient not only to apply the technology usefully, but to adapt and innovate on it if necessary, thereby making the recipient independent of the supplier in regard to that particular level of technology.*

The traditional international multilateral intellectual property legal regime has proved inadequate in responding to the needs of a large group of technologically under developed States because of the weaknesses set out above. To bring this regime in line with the needs of a technologically interdependent international community, several issues must be addressed. The major ones include the need to incorporate the principle of balance of commitments when considering traditional issues such as balance between protection of intellectual property rights and the `developmental interest' of the host states, such as the need by those states to create special intellectual property regimes for particular sectors, develop specific product or process categories, enforce working of granted rights or make provision for grant of special patent rights to nationals. Such development interests are different from the development related aspects such as royalty payments, repatriation of such royalties, piracy, distributorships , counterfeiting, etc. as noted above. *Preferential treatment*, must be fully incorporated into the framework of the conventions as a minimum legal requirement and not as a *voluntary choice* for intellectual property owners. The standard of preferential treatment should accord with the level of technological development of the recipient country. Such a course, maintained over time will concretise the

current multilaterally inspired effort by developing countries to fully conform their national legal systems to international law requirements.

Because of the methodological approach, we did not ignore the complex factors linked to the acquisition of technological capacity by developing countries. We therefore noted the link between publicly and privately sponsored international technological flows and the surrounding issues such as those of the new international order, that is, environmental concerns, the role of technology in development and maintenance of political and economic independence, the role and effect of international trade on developing countries' acquisition of technological capacity, etc. Specifically, we were able to trace the link between multilaterally developed legal principles, standards, procedures, procedures, etc. and national, sub-regional and regional state practice in relation to acquisition of technological skills from extra territorial sources.

The major new general principle that has out of international organisation and national state practice in relation to acquisition of technological capacity is the *balance of commitments principle*[845] which requires state parties, inter alia, vis-a-vis to exercise good faith, prevent unjust enrichment and/or extra-territorial abuse of rights by nationals, for example, by supplying dangerous or obsolete technologies or using general restrictive practices. Further, the principle would require home states as part of their undertaking to promote access by all countries to advances in science and technology, to assist developing countries, especially the least developed to acquire a technological capacity in relevant technologies, through offer of preferential treatment in accordance with the level of technological development of each country. Developing countries are to conform their national laws and regulations to international law, that is, provide transparent

technology development and transfer regimes, offer non discriminatory treatment to non nationals and allow them to fully participate in the technological development of the host state as part of joint international technological co-operation, etc. In short, the principle calls for equality of overall commitments, as legally determined.

Within this framework, the conflict between private party technology owners and host states becomes muted, since standards of treatment are multilaterally determined and legal settlement of disputes is available through multilaterally determined channels. The determination of rights and obligations is therefore multilaterally moderated, instead of being undertaken through traditional absolute laissez-faire legal principles such as freedom of contract, caveat emptor, etc. International technology transfer practice has shown that the modification of the traditional principles without violating private rights is guaranteed through the joint international (organisation) host state implementation of multilaterally agreed principles (mixed jurisdiction). The use of such joint implementation has resulted, in addition to the modification of traditional principles, in the creation of new terms and channels by private parties involved in international technology development and transfer. These new channels and terms show that private parties have responded to their state's recognition of the existence of new international technological conditions and new international obligations relating to technology. Taken as a whole, an international legal regime is gradually

concretising, extending to deal with the problem of transmission of technological and scientific 'systematic' knowledge to all countries, especially the least developed among them.

FOOT NOTES

FOOTNOTES FOR INTRODUCTION

1. As Schneider correctly notes, no problem of international law can be viewed realistically without considering it within its political, economic, sociological, scientific, technological and other factors. Similarly, no solution to the problem can be achieved which does not accommodate these realities - See J. Schneider, **World Public Order of the Environment, Towards an Ecological Law and Organisation**, 1979, at p.110; The fundamental importance of technology to the development of all human socities has now been recognised by all states, as we shall show in this work, See also Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind, GAR 3384 (XXX) of November 1975.

2. For an economic review of this period, see, **International Investment**, Edited by Peter J. Buckley 1990, especially pp.38 & 166.

3. We argue that this presumption is erroneous that is to constitute a technology transfer, the recipient must acquire an adequate capacity to use and apply the relevant technology and made necessary modifications thereto. Under this interpretation, the supplier is under duty to guarantee, in good faith, full and complete absorption of the supplied technology by the recipient - See chapter 1 of this work - **Methodology and Issues**, for a working definition of International Development and Transfer of Technology.

4. The last stage of this period was represented by the League of Nations Period and partly in the Pre - New International Economic Order United Nations which substantively carried on the same functions as the league of Nations. For a History of the League, see F. P Walters, A History of the League of Nations (1969). For evolution of the international legal community, see H. Mosler, The International Society as a Legal Community, 1980.

5. **Bilateral Investment Treaties**, United Nations Centre for Transnational corporations, **UNCTC**, ST/CTC/65, especially pp.346 - 351; Collection of Treaties, Alliances and Conventions relating to Security, Commerce and Navigation of the British Dominions, London, S. Buckley (Printers) 1717; State Responsibility and Bilateral Investment Treaties by M. Sornarajah, p.80; **Technology Trade, Joint Hearings** before the Committee on Science and Technology and the Committee on

Interstate and Foreign Policy of the Committee on Banking, Finance and Urban Affairs, United States House of Representatives and the House Task Force on Industrial Innovation, 96th. Congress, June 1980.

6. For example the British Industrial Property System continued to be applied by many former British territories in Africa. Reform of laws in such countries does not automatically terminate the application of the foreign 'controlling' system in practice - See 5 **World Intellectual Property Reports,** Volume 5, No. 9 at p. 231 and chapter on industrial property system.

7. View taken by, among others, Oscar Schachter, in Review of the United Nations Code of Conduct for Transnational Corporations, Hearing Before the Sub-Committee on Human Rights and International Organisations of the Committee of Foreign Affairs, House of Representatives, 100th... Congress, May 1987 at p.36; see also chapters 1 and 5.

8. **Re - Orientation of Industrial Strategy in Developing Countries and selection and Application of Industrial Technology,** Papers Reviewed at United nations Industrial Organisation (UNIDO) Second Consultative Group on Appropriate Technology, UNIDO Secretariat, ID/WG.279/4, 1978; **British Overseas Investment in the nineteenth Century** by P.L. Cotrell, Economic History Society, 1975.

9. Judge T.O. Elias noted that the problem of the necessity of rethinking a whole series of the relations between legal principles of freedom of states [Sovereign authority] and non-governmental economic actors like transnational corporations {and rethinking} the formal and substantive equality legal relationship between states [sovereign co-operation], must have regard for economic, political and legal facts of the infrastructure of the international economic order as well as the nature of the problems to be resolved - See T.O. Elias, **The International Court of Justice and some contemporary problems** (1983) at p. 235; **Transnational Corporations in World Development, Trends and Prospects, UNCTC,** ST/CTC/89, 1988, P. 178, (UN, New York) and table 1. In the Case of Anaconda V OPIC the ability of Transnational Corporations to maintain control in host country socio-economic activity was discussed. It was held, *inter alia,* that even though the transnational corporation, Anaconda, had been stripped of part of its equity and a made a minority shareholder in its subsidiary, it still retained effective control - Anaconda Co. and Chile Copper Co. V OPIC, American Arbitration Association, I.L.M (14) 1975 pp. 1237-1238.

10. The traditional areas when a state may be held responsible are:

(i) When it fails to honour a treaty;
(ii) If it damages the territory or property of another state;

(iii) If it violates the territorial sovereignty of another state;

(iv) If it uses armed force against another sate;

(v) If it injures the diplomatic representative of another state;

(vi) If it injures the nationals of another state.

Thus by excluding multilateral commitments to promote the transfer of technological skills as extending to international technology development and transfer activity involving their nationals, developed countries have been able to avoid any responsibility for regulation of privately sponsored international technology development and transfer flows, that is a duty to ensure good faith, prevent unjust enrichment or restrictive practices, duress, etc. by their nationals in their international technology development and transfer activity, is denied.

11. **Paris Convention for the Protection of Industrial Property** (1883), as revised at Brussels (1890), Washington (1911), The Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967) amended in 1979, with 100 members as of the 1st.. of August 1989. For an outline of the main features of the Convention, see The Paris Convention for the Protection of Industrial Property, main features and revision, National Seminar on Industrial Property, WIPO/Kla./89/16. 1989; World Intellectual Property Organisation, WIPO Background Reading Material on Intellectual Property 1988.

- Note - The Paris Convention for the Protection of Industrial Property, was initially signed by 11 countries in 1883. These founder members were either metropolitan states, their dependencies or countries with strong historical trade ties to the metropolitan states that is Belgium, Brazil, France, Guatemala, Italy, Netherlands, Portugal, Salvador, Serbia, Spain and Switzerland. These were quickly followed by the other major trading nations of the time, except the United States and the Russia. See also Chapter 2 of this work on the international Industrial Property System and Technology Transfer.

12. For discussion of North - South Licensing of Intellectual Property Rights, see Chapter 4 of present work. Throughout this work, reference to intellectual property includes industrial property, unless specified.

13. The effects are increasingly varied and may include environmental, health, political, individual, cultural or social rights etc. see - Transferring Hazardous Technologies and Substances. The International Legal Challenge, by Gunther Handl & Robert E. Lutz, Graham and Trotham, Martinus Nijhoff, 1989.

14. According to Koskenniemi, Inter dependency posits a causal law (E.g. of economic behaviour or environmental degradation) that makes it possible to over rule statehood, See **Theory and the Practitioner,** Martti Koskenniemi, in **Theory and International Law, An Introduction**, Papers published by the British Institute of International and Comparative law, London, 1991. The ICJ lists, as the most important standards of inter - State relations:

(i) Non - use of force;
(ii) Non - intervention;
(iii) Self-defence;
(iv) Respect for Sovereignty

See Us Military and Para Military Activities Case, ICJ Reports 1986, 97, paragraphs 183-215; also General Assembly on the Issue of the Admission of a State to Membership in the United Nations; Advisory opinion of the ICJ Reports 1948.

15· See **Chapter 1 on Methodology** and Issues for a discussion of the nature of international legal norm formation in the organised international community.

16. Generally, see - Generally, see - **The Law - making Functions of the Specialised Agencies of the United Nations** (1973) by Alexandrowicz, C. H. D. Bowett, The Law of International Institutions, 1982; D. Bowett, **The Law of International Institutions**, 1982.

17. The concept of framework treaties as modern treaties which are aimed at dealing with international legal relationships that are both close and broad as well as dynamic and practical, thus requiring constant operating decisions which add to or alter previously agreed rules as opposed to *treaty law which is by nature largely static* even if implemented in stages- See **Creating a European Economic Space : Legal Aspects of EC - EFTA Relations,** Papers from the Dublin Conference 1989, Edited by Mary Robinson and Jantien Findlater - Irish Centre for European Law, 1990.

18· The standard of preferential treatment, we argue, varies according to the level of technological development of the developing country, that is special treatment is offered to the least developed countries, fair and favourable treatment (FF) to medium developing countries and "graduated" treatment to the highly advanced developing countries - that is these latter states are classified as of net contributor status in their multilateral programmes with the **UNDP**.

19· See chapter on Methodology and issues for a working definition of technology development and transfer. We argue in this work that supply of technological skills which are not effectively that is wholly and completely fully and completely assimilated by the recipient does not constitute a transfer of the technology involved.

20. **Berne Convention for the Protection of Literary and artistic Works** (1886), completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914), revised at Rome (1928), Brussels (1948), Stockholm (1967), Paris (1971), Universal Copyright Convention (1952) revised at Paris 1971.

21. **Universal Copyright Convention** (1952), Revised in 1971. Initially entered to principally to encourage the United States, then not a member to Berne, to join a multilateral convention.

22. See chapter 2 of this work for a discussion of the implications of this **Round** to balance of commitments between developed and developing countries in regard to trade and exchange of technological rights.

23. The suggestion of such reversal is very strong in the current trade related "reforms" of the international intellectual property system under **GATT** - See, **Technology, Trade Policy and the Uruguay Round,** Papers presented at a Round Table at Delphi, Greece, United Nations Conference on Trade and Development - **UNCTAD**, Doc. ITP/23, United Nations, new York, 1990; **Technology Selection, Acquisition and Negotiation, UNCTAD** Doc.ITP/TEC/22.

24. The Draft Final Act of the Uruguay round has meet with dissatisfaction from all parties, especially the developing countries. However, developing countries are still

being "saved" by the **GATT** rules which require acceptance or rejection of the entire negotiated package as a whole. Developed countries are still disagreed on other areas such as protectionism in agricultural subsidies. Developing countries have also sought to adopt the measures under **WIPO** which is committed to resolution of the technological needs of developing countries and rates their technological development as a primary issue and trade in technology as development related - See GATT or WIPO, New Ways in the International Protection of Intellectual Property, Friedrich - Karl Beier and Gerhard Schricker (Editors), Max Planck Institute 1989; chapter 6.

25. See chapter 4 for discussion of the Lome Convention and Andean Pact arrangements.

26. The Lome Convention, now in its fourth phase, is an update of the 1963 Yaounde I Convention (EEC - and 18 AASM's or associated African States and Madagascar), 1969 Yaounde II Convention, (EEC - 20 AASM's), 1975 LOME I (1975) Convention (EEC - Afro - Caribbean and Pacific States, ACP)[1976] O.J.L 25/2, LOME II 1979, [1980] O.J.L 347/2, Lome III and IV. The Fourth Lome Convention has 69 signatory ACP states. For a full text of current Lome IV Convention, see, Compiled Texts of the Fourth Lome Convention, signed at Lome 15 December 1989, ACP - EEC Council of Ministers, Doc. BX - 71 - 91 - 073 - EN - C (catalogue number), Official Publications of the European Communities, Brussels, 1992; The Courier (Magazine), No.120, March - April, 1990.

27. The well known **Hull Formula** was enunciated during that phase of inter - State relations (1938) which in legal terms may be summed up as a transition from the law of power (manifested through *inter alia*, extra-territorial non - legal enforcement of the powerful state's claims) towards negotiated settlement of international disputes within permanent multilateral frameworks. The position, set out in a letter from the United States Secretary is to the effect that the quantum of the expropriated property or undertaking be determined in accordance with its current "fair market" value, future income prospects and intangible assets held by the under taking, such as goodwill associated with it (and know-how) - Hull's letter, reprinted in Hackworth, 3 Digest of International Law (1942); **Anglo - Iranian Oil Co. Case** (United Kingdom V Iran) I.C.J Pleadings (1951); **Chorzow Factory Case** [1927] P.C.I.J Series A, No. 13.

FOOT NOTES FOR CHAPTER ONE

28. Reference to international development and transfer of technology is principally in the North - South or Developed - Developing Country Context. Special characteristics of current international technological relationships between developing and developed countries include largely unilateral ownership, lack of an international regulatory institution or mechanism, the complexity of the subject, the existence of dual use technologies that can be put to military and civilian purposes etc.

29. See discussion on sources of law below.

30. International organisation declarations may formulate law if the majority of the parties so intend - See for instance, Nicaragua United States (Merits) Case ICJ Reports 1986, p.14. For declarations to have legal force (customary), their exact content should be ascertainable and conformed to by state practice indicating a belief (existence of a subjective element inherent in the notion of *opinio juris sive necessitatis*) - North Sea Continental Shelf Cases, ICJ Reports 1969, p.44, para 77.

31. According to Dr. Koskenniemi, treaties, custom or general principles of international law are law not because they reflect just principles or divine will but because they encapsulate a social consensus. That social consensus is legally determined by examining international society through the judicial function or more generally through the law applier. He concludes that only these two modes can distinguish between political and legal obligation, convenience and custom, violence and enforcement. This analysis, though very valid in its initial conclusion i.e that sources of international law derive their validity from the international social consensus, fails to advance further when no distinction is made between international consensus as legally expressed in organised vis a vis unorganised international society. Thus for instance, while no case has been submitted under the Paris Convention dispute resolution mechanism and international intellectual property practitioners in this area do not determine what is to be regarded as international intellectual property law, it is apparent that the initial minimum standards contained in the in the Conventions have been and are still in the process of being modified through institutionalised multilateral state practice and other legal means available to organised international society - See, **Theory and the Practitioner**, opcit. note 14.

32. Sir Henry refers to this view as the greatest legal fiction - See, The Development of Law by Sir Henry Maine, in **The Political Economy of Law - A Third World Reader**, edited by Yash Ghai, Robin Luckman & Francis Synder, Oxford University Press, 1987, at p.63.

33. Situation where a party lacks the aptitude, experience, or judgemental ability to make a deliberative and well informed judgement concerning the desirability of entering into a given complex transaction - these arrangements which involve a severe though not readily apparent potential for unfairness, may be upset at the national level but due to the presumption of equality of states and lack of mandatory international regulations, may be perpetuated with impunity at the international level - See The Bargain Principle and its Limits by Melvin Eisenberg, HLR, Volume 95, February 1982, Number 4 quoted in International Library of Legal Essays in Law & Legal Theory, Areas 3.1, **Contract Law**, Volume 1, Edited by Larry Alexander, Dartmouth 1991 at p.741.

34. In this area it can now be said that an international market which emerged especially during the last decade (1980's) is now conceretising. *Evidence of the market is visible in technology lists, advertisements, notices and data banks* under the aegis of professional engineering and licensing societies, as well as multilateral agencies such as the United Nations Industrial Development Organisation (UNIDO). Characteristics of the market include the existence of brokers and consulting organisations which act as middlemen, attracting buyers and sellers from several nations and *technology marketing groups* (which now exist in the majority of

transnational corporations and serve the purpose of identifying a corporation's many technologies, negotiating with other subsidiary units which technology may be sold externally or retained, identifying technology buyers in other industries and nations etc.). Such a market, will result in the enhanced ability of states to understand the nature of the otherwise complex international technology development and transfer transactions.

35. The Philosophical Origins of Modern Contract Doctrine by Gordley James, Clarendon Press, Oxford 1991, at p.230 - shows through comparative legal analysis, that here is no such theory today.

36. Gordley J, opcit. note 35, pp. 230-236.

37. The Principle of good faith, as noted in context above (Chapter 5), has long been accepted as part of international law.

38. See Robert Sideman - Contract Law, The Free Market & State Intervention - In The Political Economy of Law, opcit., not 32 at p.439.

39. The sources of International Law by David Kennedy, in International Law, Editor - Martti Koskenniemi, The International Library of Essays in Law and Legal Theory, [1991] at p. 304. For examples of Municipal vis a vis International Law discourse, see B. Weston, R. Falk and D'Amato, International Law and World Order 80 - 101, 116 (1980) at pp. 163-189.

40. Georg Schwarzenberger, The Dynamics of International Law, Professional Books ltd. 1976, at P. 2.

41. For this type of discussion, the literature grew rapidly, especially in the 1970's and early 1980's. See for instance - Gribaldi, The legal Status of the General Assembly Resolutions, some Conceptual Observations (1979) 73 Proc. Am. Soc. Int. Law at 324; Kamal Hossain (Ed) Legal Aspects of the New International Economic Order (NIEO), 1980, especially part III, Law of the Sea and the New International Economic Order (NIEO), The Challenge of Soft Law: Development and Change in International Law, by C.M. Chinkin, International and Comparative Law Quarterly, Volume 38, 1989; Riphagen, From Soft to Jus Cogens and Back (1987) 17 V.U.W.L.R., at p. 81.

41. See Kennedy, in International Law, opcit. note 39.

42. Kennedy, opcit. 39, at pp. 312-313.

43. Discussion of the 'Dualist' or 'Monist' theories of international law is beyond our current purposes, however, See C. Rousseau, *Droit International Public (1970)* at pp. 37-48.

44. Legitimacy in the International Legal System, by Franck in *The Sources of International Law*, infra note 49, at p. 303.

45. See for instance - Progressive Development of the Law of International Trade: Report of the Secretary General Assembly, 21st Session Annex Agenda, Items 88, Document A/6396, Year

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Book of the United Nations Commission On International Trade Law (UNICTRAL) Volume 1, 1970.

46. Progressive international law making or rule creation to guide conduct or influence decisions has been speeded up by the 'saturation' of state capacity to formulate, negotiate, ratify and implement specific treaties and the difficulty of achieving consensus regarding the regulation of complex matters with a high degree of unforeseeable effects in case of failure to rapidly conclude and effect commitments, see - Review of the Multilateral Treaty making Process, United Nations Treaty Series (UNTS), ST/LEG/SER.B/21, New York 1985, especially, sections 56, 62 and 151 - 158.

47. The last stage of this period was represented by the League of Nations Period and partly in the Pre - New International Economic Order United Nations which substantively carried on the same functions as the league of Nations. For a History of the League, see F. P Walters, A History of the League of Nations (1969). For evolution of the international legal community, see H. Mossler, The International Society as a Legal Community, 1980.

48. F. P Walters, opcit , note 4.

49. Virally, The Sources of International Law, in Manual of Public International Law 116 (M. Sorenson ed. 1968). Brierly sets out the following criteria for practice to qualify as opinio juris, there had to be a general recognition among states of a certain practice as obligatory and concordant practice by a number of states with reference to a type of situation falling within the domain of international relations; continuation or repetition of the practice over a considerable period of time; conception that the practice is required by, or consistent with, prevailing international law ; general acquiescence in the practice by other states; each of the four elements being established by a competent international authority; See Brierly, **The Law of Nations**, 4th edition 1949, at p. 62; Hudson , Article 24 of the Statute of the International Law Commission , United Nations Doc. A/CN.4/16, rep [1950] 2 **Year Book of the International Law Commission**, 24, 26, United Nations DOC.A/CN.4 Ser....A/1950/Add.1.

50. North Sea Continental Shelf Cases (Ger. V Den; Ger V Neth) 1969 I. C.J, 2, 43.

51. Though the two elements of opinio juris and consistency seem necessary, under unorganised international practice, they always seemed to conflict , a problem still encountered by jurists insisting on consistent evolution as the standard for judging existence without taking into account the changed nature of inter - State communication through permanent multilateral institutions, which among others, speeds the dissemination and adoption of uniform multilateral rules, standards, procedures, etc.

52. For the reduction in value of the time element, see Cheng, **United Nations Resolutions on Outer Space: Instant Customary Law**? 5 Indian Journal of International Law 23,35 (1965); Baxter, Treaties and Custom, 129 Recueil Des Cours 25, 44 (1970).

53. The principles of international law are the product of the collective consent of states in the norm creation process - The Lotus Case, France V Turkey (1927) P.C.I.J

Report, Series A, No. 10. To form custom, general consent is required vis a vis universal consent. The standard of general consent is not absolute and general uniformity of the views of all states or the dissent of a single state is insufficient to prevent the creation of custom. However, the practice in question should be uniform among states which should mutually regard recurrence of such practice as the result of a compulsory rule; See Judge Negulesco Dissenting Opinion in the case of jurisdiction of the European Commission of the Danube, 1927 P.C.I.J. (ser. B) No. 14 at 105 (advisory Opinion of December 8).

54. According to D'Amato, since there is no metaphysically precise (such a seventeen repetitions) or vague (such as - in the Court's Discretion -) answer possible [and] States simply do not organise their behaviour along absolute lines [having] no international constitution specifying when acts become law; states resort to international law in claim - conflict situations when they attempt to cite as many acts [instances of] as possible to prove the existence of the custom - See A. D' Amato, The Concept of Custom in International Law (1971).

55. According to Kennedy, in increased emphasis upon individual consent increasingly identifies custom with treaties, see Kennedy, in International Law and World Order opcit. note 39 at 305; T.O. Elias, The International Court of Justice and some contemporary problems (1983) at p. 235.

56. Friedrich Kratochwil, Thyrasmmachos Revisited - On the Relevance of Norms and the Study of Law for International Relations, In International Law, Editor Martti Koskenniemi, opcit. not 39, at p.55. In Trendtex Trading Corp V Central bank of Nigeria [1977] Q.B. 529, Lord Denning noted that rules of international law change and international law knows no rule of stare decis.

57. See for instance, Dr. Khan, International Right to Development, in Science Technology and Development, Journal of the Third World Science, Technology and Development Forum, Volume 17, No. 1, August 1989 at p. 12; Does anyone still ask the question 'is international Law really Law', by Robert MacLean, in The Juridical Review, The Law Journal of Scottish Universities, 1991, @. Green, Publishers, Edinburgh, pp. 230-249.

58. Friedrich Kratochwil, Thyrasmmachos Revisited - On the Relevance of Norms and the Study of Law for International Relations, In International Law, Editor Martti Koskenniemi, opcit. note 39, at p. 49; also - Dworkin, Taking Rights seriously, Cambridge University Press, 1978.

59. See Dr. Koskenniemi, opcit., note 14, at p. 6.

60. The United Nations lies at the centre of this network of new and complex legal inter-State relationships. Despite disclaimers to the contrary, no single comprehensive international or multilateral body lacks a legal link to the United Nations.

61. According to Koskenniemi, Inter dependency posits a causal law (E.g. of economic behaviour or environmental degradation) that makes it possible to over rule statehood, See Theory and the Practitioner, opcit. note 14; The ICJ lists, as the most important standards of inter - State relations:

(i) Non - use of force;

(ii) Non - intervention;

(iii) Self - defence;

(iv) Respect for Sovereignty :
See US Military and Para Military Activities Case, ICJ Reports 1986, 97, para's 183 - 215.

62. The norms formed through this process have variously been reffered to, inter alia, as recommendatory norms - See Grigory I Tunkin, **International Law and Other Social Norms Functioning Within the International System**, in Contemporary Problems of International Law - Essays in Honour of Georg Schwarzenberger, edited by Bin cheng and E. D Brown, London, 1988; The Political Economy of Law, opcit note 32, at p. 406.

63. Is International Law Really Law, by Anthony D ' Amato, in Martti Koskenniemi, (editor) opcit. note 39.

64. Code on the Transfer of Technology - Preamble.

65. Frequently, especially in the least developed countries, the factor of mistake may often be assumed to be a failure of the recipient (who is often inadequately informed) and the loss lies where it falls.

66. See Chapter V for a discussion of the relationship between state practice and evolution of and international legal regime for the regulation of international development and transfer of technology.

67. The negotiation or performance gap of a specific country may be indicated by the level of intellectual or industrial property rights held by nationals vis a vis non nationals. See Table B, annexed.

68. The World Intellectual Property Organisation is a specialised agency of the United Nations, established under the Stockholm Convention of 14th July 1967 [herein after **WIPO**]; Other reform efforts (regarded as parallel or even contrary to **WIPO** reforms by many developing countries) are currently under way in the General Agreement on Tariffs and Trade (**GATT**) see chapter 4 of present work.

69. Berne Convention for the Protection of Literary and artistic Works (1886), completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914), revised at Rome (1928), Brussels (1948), Stockholm (1967), Paris (1971), Universal Copyright Convention (1952) revised at Paris 1971.

70. See Chapter VI of Current Work.

71. Paris Convention for the Protection of Industrial Property (1883), as revised at Brussels (1890), Washington (1911), The Hague(1925), London (1934), Lisbon (1958) and Stockholm (1967) amended in 1979, with 100 members as of the 1st.. of August 1989. For an outline of the main features of the Convention, see The Paris Convention for the Protection of Industrial Property, main features and revision, National Seminar on Industrial Property, **WIPO**/Kla../89/16, 1989; World

Intellectual Property Organisation, **WIPO** Background, Reading Material on Intellectual Property 1988.

72. See Chapter III of this work.

73. For discussion of this concept, see **Legal Features of Multi-bilateral Aid** by Sergio Marchisio in The Italian Year Book of International Law, Volume 7, 1986 - 1987. In this work, this term is applied only to regional or inter regional arrangements and is not taken to include purely multilateral arrangements such as those under **UNDP**.

74. See Chapter V of this current work for discussion of the incorporation of the multilaterally evolved requirements for transparency and the impact of the principle on the clarification of the 'mixed jurisdiction' concept and its meaning in relation to legal regulation of international transfer and development of technology.

75. **Technology Transfer Mechanisms in the United Kingdom and Leading Competitor Nations**, Innovation Working Party, National Economic Development Council, 1989 p.11 - 17.20; The Changing Technological Scene Trends in Selected Developing Countries prepared by International Industrial Licensing Consultants, United Nations IPCT. 138 (SPEC) at p.101 - 106.

76. See - Transnational Corporations in World Development, Trends and Prospects, **UNCTC**, ST/CTC/89, 1988, p.178, (UN, New York) and Table 1.

77. **WIPO** Licensing Guide.

78. WIPO - Licensing Guide..; Also, Workshop on Industrial Property Rights in Joint Venture Arrangements, held in China, Lecture No. 2 - Methods for the Commercial Transfer and Acquisition of Technology and their Relationship to Joint Venture Arrangements, Lecture prepared by the International Bureau of the World Intellectual Property Organisation, **WIPO** DOC. WO/BW/2, Geneva, October 1982.

79. Report of the United Nations Conference on Science and Technology for Development, Vienna August 1979 , New York, United Nations; see Chapter VII of the **Vienna Programme of Action on Science and Technology for Development**, p.48, para 1; **Science and Technology in Developing Countries**, Proceedings of a Conference held at the American University of Beirut, Lebanon, December 1967, Cambridge University Press, 1969, at pp.493 - 519, especially at p.570.

80. Traditional Foreign Investments constituted principally of : Concession agreements, extra-active ventures or exports of capital. See Chapter V of current work for a brief discussion of a few of the issues involved in the regulation of Foreign Investments debate.

81. See Chapter Seven of current work.

82. Para. 1.2, TD/Code TOT/47, Chapter 1.

FOOT NOTES FOR CHAPTER TWO

83. **Science and Technology in Developing Countries**, Proceedings of a Conference held at the American University of Beirut, Lebanon, December 1967, Cambridge University Press, 1969, at pp.493 - 519, especially at p.570.

84. See for instance, International Right to Development by Dr.K .R. Khan, in Science, Technology and Development, Journal of the Third World Science, Technology and Development Forum, vol. 7, No.1, August 1989 at p.15.

85. The **Paris Convention** for the Protection of Industrial Property, was initially signed by 11 countries in 1883. These founder members were either metropolitan states, their dependencies or countries with strong historical trade ties to the metropolitan states that is Belgium, Brazil, France, Guatemala, Italy, Netherlands, Portugal, Salvador, Serbia, Spain and Switzerland. These were quickly followed by the other major trading nations of the time, except the United States and the Russia.

86. Provides that industrial property is to be understood in its broadest sense, and applies not only to industry and commerce proper, but also to agriculture and extractive industries and to all manufactured or natural products.

87. Today, the principle of territoriality is under threat from the universalist 'reforms' which if or when implemented, will transform intellectual property protection into international trade issues or measures, see **Chapter 6** of current work.

88. The French Patent Law of 1791, which promoted the natural law idea of intellectual property rights as belonging to the creator, noted that 'it would be a violation of the very rights of man in their very essence if an industrial invention were not regarded as the property of its creator'; Venice Patent Law of 1474 provides the earliest example of a natural law right in intellectual property; the English Statute of Monopolies 1623 also contains natural law rights; the International Congress on Industrial Property in Paris reaffirmed the principle that the right of the inventor is a right of property that the civil law does not create but simply regulates etc; See The Role of Patents in the Transfer of Technology to Developing Countries (United Nations) 1964, E/3861/Rev.1, and follow up **UNCTAD**/B/AC.11.19.Rev.1; also Legal Aspects of the Transfer of Technology to Developing Countries, by Michael Blakeney, Oxford ESC, 1989, quoting the Preamble to the French Patent Law adopted by the Constitutional Assembly after the revolution as cited by Machlup and Penrose, The Patent Controversy in the 19th Century, 1950, 10 Journal of Economic History, p.1.

89. Hansard's Parliamentary Debates, 3rd series 1851, Vol.cx Viii, 1st. July 1851, col.11.

90. **Universal Declaration on Human Rights**, UN. DOC.A/811 (1948), article 27, para 2.

91. Berne Convention Implementation Act of 1987, hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, of the Committee on the Judiciary, House of Representatives, 100th Congress 1987 (Micro Fiche) at p.83.

92. **Copyright Protection for Intellectual Property to Enhance Technology Transfer**, Hearing Before subcommittee on Science, Research and Technology, of the Committee on Science, Space and Technology, United States House of Representatives, 101st. Congress, Second Session, testimony of Dr. James W. Curlin.

93. **WIPR**, Volume . 6, No.1, January 1992 at 21

94. See also Chapter 6 of present work.

95. The Patent system was said to be, according to a famous learned critic, **"inadvisable for the public, disadvantageous to inventors and wrong in principle"** - Hansard's Parliamentary Debates, 3rd series 1851, Vol.cx, viii, 1st. July 1851, Col.13, Speech by Lord Granville, Master of the Rolls; also The Role of the Patent System in the Transfer of Technology to Developing Countries, United Nations Conference on Trade and Development (**UNCTAD**), Doc.TD/B/AC.11/19/Rev.1.

96. See, Patent Systems and their role in the Technological Development of Developing Nations by Thomas Creel and Drew, M. Wintringham, 10 Rutgers Commerce and Technology law Journal, p.278 (1983).

97. Preamble to the Code of Conduct on Transfer of Technology s defines technology transfer as: "transfer of systematic knowledge for the manufacture of a product, for the application of a process, or for the rendering of a service".

98. World Patent Information, Information from Patents, the United Kingdom (UK) approach 1331 - 1986, Jane Fisher at p.100.

99. Creel and Wintringham, opcit, note 96, at p.278.

100. World Development Report 1991, The World Bank, at p.92.

101. World Patent Information, Volume 13, No.2, 1991, P.101.

102. See for instance the new Japanese fair Trade Commission *Guidelines for the Regulation of Unfair Trade Practices for promotion of jair competition and technology transfer* - cited in Policies, Laws and Regulations on Transfer, Application and Development of Technology, **UNCTAD**/ITP/TEC 16, 1990.

103. In The Role of the Patent System in the Transfer of Technology to Japan, the author examines this point in relation to developing countries - Columbia Journal of transnational Law 198, especially at p.138.

104. There are a few exceptions to the non - reciprocity rule under the conventions, that is material reciprocity applies under the Berne Convention, Article 7 VIII on different periods of duration, Article 2 VII on useful works of art and Article 14 ter (droite de suite); Universal Copyright Convention (UCC) Article IV : 4 (a) different periods of duration; see **GATT** or **WIPO**, opcit, note 24, p.122 -.

105. View for instance espoused for example by Hans .P. Kunz - Hallestein, **GATT** or **WIPO**, opcit note 24, p.86. The dangers of the acceptance of material or abstract

reciprocity as the basis for national treatment include the possible re - interpretation of traditional principles (**GATT** or **WIPO**) as justifying coercion of sovereign states 'wills' rather than seeking acceptance through consensus or consent. The problem is real especially because coercive measures, especially of the economic type, are difficult to define and few if any measures are perse or automatically wrong - see for instance, United Nations Conference on Trade and Development (**UNCTAD**), Designing Effective Approaches to eliminate the use of coercive measures against developing countries, **UNCTAD/ITP/31**, 1990.

106. **International Encyclopaedia of Comparative International Law**, vol.xvii, Chap 22, 1989 at p.23.

107. See, **GATT** or **WIPO**, opcit, note 24, for a discussion of the joint applicability of national treatment and reciprocity, at p.84 - 86.

108. Bier, One Hundred Years of International Co-operation. The Role of the Paris Convention in the Past, Present and Future 15 **International Review of Industrial Property**, *Verlag Chemie, Weinheim*, (hereinafter **II C**) 1 (1984); The Paris Convention, by Cabanellas, **II C** Vol.19 at 165.

109. The guarantee of national treatment was expressed thus under the 1883 Paris Convention : "Citizens of each contracting state shall, as regards Patents (brevets d, invention) industrial designs (dessins on modelles industriels), trademarks (marques de fabrique on de commerce) and trade names (le nom commercial) enjoy the advantages that their respective laws now grant or may hereafter grant to nationals; See - The Paris Convention, by Cabanellas, **II C**, 19 at p.165 (see note 108); Bier, One Hundred Years of International Co-operation. The role of the Paris Convention in the Past, Present and Future 15 **II C** 1 (1984) (see note 108)

110. For instance, Berne Convention, article 7 para 8 (restriction of term of copyright by member states to that of a country of origin); Universal Copyright Convention, article IV par.4 (a) UCC; Berne, demand for reciprocity in relation to protection of industrial designs and models - Article 2 para 7.

111. Quoted in **WIPR**, Volume 6, No.1, January 1992.

112. **WIPO**, Model Law for Developing Countries on Inventions, Vol.II, 1980; also Constantine Vaitsos, Patents Revisited: Their Function in Developing Countries in Science, Technology and Development, the Political Economy of Technical Advance in Under Developed Countries, Edited by Charles Cooper, Frank Cass (Pub's), London at p.71.

113. **GATT** or **WIPO**, quoting view of United States - Japanese - European Industry, at p.91.

114. For a discussion of the economic rights of intellectual property holders vis a vis host states, see, *inter alia* : **WIPO**, Sixth Consultative Meeting on the Revision of the Paris Convention, Geneva, **WIPO** .Doc. PR/CM/Vi/1, 1989; Multilateral Trade Negotiations, The Uruguay Round, **GATT. Doc**. MTN.GNG/NG11/12.

115. See **GATT** or **WIPO**, opcit, note 24, at p.158.

116. Report of the **United Nations Conference on Science and Technology for Development**, Vienna August 1979, New York, United Nations; see Chapter VII of the Vienna Programme of Action on Science and Technology for Development, p.48, paragraph 1.

117. Technology Trend Series, No.15, The Changing Technological Scene Trends in Selected Developing Countries prepared by International Industrial Licensing Consultants, United Nations IPCT. 138 (SPEC) at p.101 - 106.

118. The Role of the Patent System in the International Transfer of Technology to Developing Countries, United Nations, **UNCTAD** Doc.TD/B/AC.11/19 Rev.1, 1975.

119. **UNCTAD**, Committee on Transfer of Technology, Geneva, **Item 6(e)** of the Provisional Agenda, Access by Developing Countries to Technology in the Public Domain, **UNCTAD** DOC. TD.B/C.6/122 especially at p.3 section 7.

120. **Patent World**, Vol.11, No.3 pp.147 - 151, especially 148, 1989.

121. The French Patent law of 1844 provided for compulsory licences. Similarly, the Italian Law of 1939 required working which was not in gross disproportion to the needs of the country.

122. See **Chapter 6** of present work, extension of protection to product patents under **GATT** reforms, thus eliminating independent production of the same through other processes or through reverse engineering.

123. See **Chapter 6** of present work.

124. French patent law etc. opcit, note 121.

125. Second Session of the Diplomatic Conference on the Revision of the Paris Convention, opcit, at pp.38 &40.

126. Many of these apply to pharmaceutical products - Canada, Finland, New Zealand, Norway, animal varieties - Austria, Belgium, Canada, Italy, France, United Kingdom etc., Methods of treatment of human or animal body, plant varieties, food products, computer programmes, pharmaceutical processes, food processes etc. - See **WIPO Doc.** HL/CE/IV/INF/1 Rev.1 on exclusions from patent protection.

127. See Records of the **London Conference**, Explanation of Motives and Proposals, 1934, Quoted in Industrial Property Volume 23, 1984 at p.373.

128. The 1982 Geneva Diplomatic Conference on the Revision of the Paris Convention, by M. K. Kirk (1983) 15 **Intellectual Property Law Review**, p.139.

129. See **Chapter 6** of current work; The Paris Convention, Patent Protection and the Transfer of Technology, Boston University International Law Journal, Volume 13, 1985, p.209.

130. See Part of this Chapter for discussion of when a country may cease to be a developing country under the multilateral Copyright Conventions, and Chapter 6 same issue under the **GATT** forum.

131. See for instance **WIPO, Sixth** Consultative Committee Meeting on the Revision of the Paris Convention, Geneva 18 - 22, September 1989, **WIPO**, Doc. PR/VI/11, 1989.

132. Diplomatic Conference on the Revision of the Paris Convention, 2nd. Session, 5th. October 1981, **WIPO**, Doc.PR/SM/6, pp. 39 - 41.

133. Diplomatic Conference on the Revision of the Paris Convention, 3rd Session, October - November 1982, **WIPO**, Doc.PR/SM/9 at 9 - 21.

134. International System and the Developing Countries, by A Jaygovind, India Journal of International Law, Volume 20, 1980 at p.60; The Paris Convention, Patent Protection and Technology Transfer, Boston University International Law Journal, Volume 13, 1985, especially at p.209.

135. Revision of the Paris Convention, Sixth Consultative Meeting on the Revision of the Paris Convention, Geneva 18th. - 22nd September 1989, **WIPO** Doc.PR/CM/V1/1, also, Revision of the Paris Convention, Diplomatic Conference, March 1980, **WIPO** Doc.PR/DC/3.

136. See - **WIPO** Model Law for Developing Countries on Industrial Designs, Geneva 1970.

137. See also - **WIPO** Model Law for Developing Countries on Marks, Trade Names and Acts of Unfair Competition, BIRPI, Geneva 1967.

138. Existence, Scope and Form of Generally Internationally Accepted and Applied Standards/ Norms for the Protection of Intellectual Property, **WIPO** - Doc. WO/INF/29.

139. See also - **WIPO** Model Law for Developing Countries on Marks, Sections 5 and 6.

140. See **WIPO** Model Law for Developing Countries on Marks, Parts II & III.

141. See for instance **Copyright World**, Issue 8, January - February 1990, at pp. 33 - 34, also Chapter 6 of current work.

142. E.g see Article 18 of Decision 220, Andean Pact, cited in Chapter 4 of Current work.

143. See for instance, Technology Licensing in Eastern Africa, A Critical Exposition and Analysis, by Belay Seyoum, Avebury 1990, at p.38.

144. Technology Licensing in Eastern Africa, opcit. note 143.

145. Understanding Commercial and Industrial Licensing, by Brendan Fowlston, Waterlow Publishers ltd. 1984 at p.104.

146. Article 18 of the "agreed" **GATT** trade related intellectual property rights Draft provisions, reproduced in **WIPR**, Volume 6, February 1992, p.43.

147. See Chapter 6 of current work for analysis of effect of new **GATT** proposals on enforcement of intellectual property rights and dispute settlement.

148. See Windsurfing International Inc. V Tabur Marine [1985] RPC 59, especially pp 20 & 92 - in which a patent application for a windsurfer was successfully challenged because there had been a prior publication in a periodical article two years before and prior use was said to be established by previous use of the device by a twelve year old boy ten years before the patent application was filed.

149. Software plays a key role in the design and zero - defect manufacturing of products as well as in the translation of ideas into new products and processes, since it is increasingly the key to organising, using and evaluating research data - See, Copyright Protection for Intellectual Property to Enhance Technology Transfer, testimony by Mr. Lee W. Mercer in Hearings Before Subcommittee on Science, Research and Technology of the Committee on Science, Space and Technology, United States House of Representatives, 101st. Congress, Second Session, 1990 (microfiche)

150. **Copyright World**, Issue 8, January/February 1990, p.34.

151. Peter .H. Hallestein, "Recent Trends in Copyright Legislation of Developing Countries" 13 IIC 689, 1982; Tocups. N. M, Development of Special Provisions in International Copyright Law for the Benefit of Developing Countries, 29 J Cop. Soc USA , p. 402.

152. Berne Convention for the Protection of Literary and artistic Works (1886), completed at Paris (1896), revised at Berlin (1908), completed at Berne (1914), revised at Rome (1928), Brussels (1948), Stockholm (1967), Paris (1971).

153. Universal Copyright Convention, 1952.

154. For a comprehensive analysis of the Berne Convention provisions and the position of developing countries there under, see The Berne Convention for the Protection of Literary and Artistic Works 1886 - 1986 by Sam Ricketson, Centre for Commercial Law Studies, Queen Mary College, Kluwer 1987, especially Chapter 11, pp. 591 - 663.

155. Ploman & L. C Hamilton, Copyright: Intellectual Property in the Information Age (1980), pp 61 - 63.

156. See 16 **Copyright Bulletin** (1963)171; The African states espoused the view that access to information should not be unreasonably limited, since total world knowledge is part of the Common heritage of mankind, to be shared equitably.

157. Ricketson opcit, citing C Masouye, Prospects of Revision of the Berne Convention (1964) 43 RIDA 28, 30; Ricketson at p.598.

158. Stockolm Revision of the Berne Convention, Stockholm Protocol.

159. Wider than those allowed by the restrictions under Article 20 of Berne

160. Under Article 28(b) (i) , any country acceding to, or ratifying the new Act could limit its accession or ratification so as not to apply to Articles 1 - 21. Since Article 21 made the Protocol an integral part of the UCC, the majority of developed countries utilised Article 28(b) (i) not to ratify the Protocol, thus negating its intended effects.

161. See 12 **Copyright Bulletin,** 1983 at p.6; 1968 Copyright 189, 190.

162. Referred to as the Berne safeguard clause, it was aimed preventing members of the Berne Union withdrawing to join the "less strict" UCC, See Article XVII and Appendix Declaration , UCC 1952.

163. The UCC offers comparatively few mandatory standards, vis - a - vis Berne. The UCC, was supposed to establish a broad framework Convention whose members could have widely differing standards of protection.

164. According to Copyright and Development, by Abdul Hassan, 16 **Copyright Bulletin** 1982 at pp.10 -12.

165. Article 21 (2) of Berne declared the Protocol an integral part of the Convention; see - Sam Ricketson, opcit, at pp. 618 - 619.

166. Protocol Article 1(b) (i).

167. See 12 **Copyright Bulletin,** 1983 at p.10.

168. Stockholm Protocol, article 1(b) (ii) - (ix). For a detailed explanation of the compulsory licensing provisions under the unimplemented Protocol, see Ricketson, opcit, at pp. 611 - 613.

169. **Stockholm Protocol,** Article 1(e); Ploman & L.C. Hamilton, **Copyright : Intellectual Property in the Information Age** (1980), especially p.62.

170. See United States Registerer of Copyrights' statement to joint meeting of the BUPC and IGC, Geneva, 12 - 15 December 1967: (1967 - 1968) 15 Bull Cop Soc USA at P.157 - 159, cited in Ricketson, opcit. at p.621; also see General Assembly of ALAI, 23 April 1968, Paris [1968] Copyright 146.

171. For an account of the process leading to the Paris Revisions, especially with reference to Berne, see Ricketson, opcit; E Ulmer, The Revisions of the Copyright Conventions (1971) 2 **II C** 345 (see note 108).

172. International Copyright and Neighbouring Rights, by Stephen. M. Stewart, London 1983, Section 6.30 at pp. 154 - 307.

173. See Ricketson, opcit at p.663.

174. For implications of possible impact of such restrictions on developing countries technological capacity, especially in their ability to exploit information in production processes, see Chapter 6 of current work; also 16 **Copyright Bulletin**, at p.12.

175. This was in accordance *inter alia*, with the Washington Recommendation for the joint revision of both Conventions, vis: UCC Suspension of article XVII and the

Appendix Declaration for the benefit of developing countries; Inclusion of authors basic rights of reproduction, of broadcasting, and of public performance; Inclusion of rules permitting relaxation of those rights, as well as the right of translation, for the benefit of developing countries without material reciprocity.
Berne: Revision of Article 21 of the Stockholm Act to separate the Protocol regarding developing countries from that Act; *Provision under which the revision of Article 21 can become effective only upon ratification of the revised Universal Copyright Convention by France, Spain, the United Kingdom and the United States of America;* Provision to allow developing countries member of the Berne Union to apply in their relations with other members of that Union the revised text of the Universal Copyright Convention; Suspension of the obligation of paying contributions to the Berne Union by developing countries having chosen Class VI or VII for the purposes of contribution. Ricketson, opcit p.629, - quoting R Fernay, "*La Recommendation de Washington*" (1970) 63 RIDA 87.

176. Ricketson, opcit, at p. 929, citing E Ulmer, "The Revision of the Copyright Conventions in the Light of the Washington Recommendation" (1970) 1 **II** C 235. (see note 108)

177. International Copyright and Neighbouring Rights, by Stephen. M. Stewart, London, 1983 at p.63.

178. Copyright Protection for Intellectual Property to Enhance Technology Transfer, opcit.

179. Traditionally, such leverage has been exercised, especially in recent times by the United States, during bilateral negotiations and is reflected in the resultant treaties - see Berne Convention Implementation Act of 1987. Hearings before the Subcommittee on Courts, Civil Liberties and Administration of Justice, of the Committee of the Judiciary, House of Representatives, 100th. Congress 1987 (Micro Fiche) at p.82.

180. The gains are limited because of the persistent and unjustifiable continued use of LDC's as export markets for works produced in developed countries, complexity of the procedures which have to be undergone before an LDC can issue a compulsory licence , the new threat of international trade linked enforcement mechanisms to enforce individual or private rights etc.- See UNESCO/WIPO/WG III/CWA/3 and Annex 1 at Sections 1 - 86.

181. For detailed analysis of developing countries position under Berne, see Ricketson, opcit, though that author admits (that is at P.632) that explanations of the meaning of many provisions of the Appendix are given either tersely or omitted (silent) in the General Report of the Berne Revision Conference.

182. Article 1 (1) of the Berne Convention.

183. *Records* 1967, 1194, cited by Ricketson, opcit.

184. See Chapter 3 of current work (net Contributor status).

185. Stephen .M. Stewart, opcit at section 6.39. Notification is to the Director General of WIPO in the case of Berne - Article 1(2) of Appendix, and UNESCO - UCC 1971, Article V^{bis} (2).

186. Article V (1) 9 (a) of the Appendix to Berne.

187. Article V ^{bis} (bis) of the UCC (1971) and Article 1 (3) of the Appendix to Berne.

188. See Chapter 6 of current work. Graduation before proper balance is achieved between technological capacity in vital sectors as well as social and cultural needs, places the graduated country in danger of becoming a mechanical society which over rates the importance of technological innovation and development - See The Economist, April 1988 at p.74.

189. See Chapter 6 of current work. Moral rights are omitted from the "agreed" Draft on trade related aspects of intellectual property under the Round.

190. The view of copyright as a freely alienable economic right is in line with United States statutory and common law - See Berne Convention Implementation Act of 1987, Hearings, opcit, p.83.

191. Article 8, Berne Convention.

192. See for instance, Information Technology, The Challenge to Copyright, London, 1984, Protecting and Exploiting New Technology and Designs, Keith Hodkinson, London, 1987.

193. Article II (1) of Berne Appendix.

194. Article V ^{ter} of the UCC (1971) and Article II of Appendix - See Ricketson opcit at pp.611 - 613.

195. UCC Article V; Berne Article II(1).

196. UCC Article V; Berne Article II (2).

197. See Bogsch - Commentary to Article V, The Law of Copyright under the UCC, Leyden, New York, 1964 especially p.64.

198. 1 **World Intellectual Property Report** 1987 at pp. 3 - 5.

199. Multilateral Trade Negotiations, the Uruguay Round MTN.GNG/NG11/W/12 (1987) para. 39; **Copyright Bulletin**, 1982 at p. 8 - 9, Article V ^{ter} UCC (1971) and Berne Article II (9) (a).

200. UCC (1971) , Article V and V ^{ter} (1); Berne Appendix Article II (2) (a).

201. UCC (1971), Article V ^{ter} 1(b) ; Articles II (2) (b) and II (3) (a) of the Berne Appendix.

202. UCC 1971, Article V ^{ter} (1) (b), Article II (3) (b) of the Berne Convention (1971).

203. UCC 1971, Article V ter (4); Berne Appendix Article II (4) (a) (i) and Article IV (1) of Berne Paris Act 1971.

204. UCC 1971, Article V ter (4); Berne Appendix Article II (4) (a) (ii) and Article IV (2) of Berne Paris Act 1971.

205. UCC 1971, Article V ter (6) and Article II (6) Berne Appendix.

206. See David Ladd - **Copyright and the International Technological Environment**, 17 **Copyright Bulletin** 1983 at p.21.

207. UCC (1971) Article V quater and Article III of Berne Appendix.

208. See Riketson, ocpit, at p. 649, for a discussion of issues relating to the determination of a reasonable or normal price, especially given sometimes extreme differences in value of hard and soft currency, the effects of monopolistic activities on the part of overseas or local publishers or distributors etc.

209. UCC (1971), Article V quater; Berne Appendix, Article III (2) (a).

210. Berne Appendix, Article III (3) (i).

211. 17 **Copyright Bulletin,** 1983 at p.8.

212. UCC (1971), Article V ter 4 (a) , 4 (b) and V quater 1 (f) and 2 (a) ; Berne Appendix - Article 4 (c) for exceptions to ban on export of translations.

213 E.g where a contracting state does not have on its territory the means to print or reproduce or if they exist they cannot be utilised for economic or practical purposes, printing can take place outside the national territory on the territory of a member state of the Berne Union. Such reproduction must be limited to the purposes for which the licence is granted .

214. UCC (1971) Article V ter (4) (c) ; Berne Appendix, Article 4 (c); see Article II and III of Berne Appendix for exceptions to ban on export of reproductions and translations respectively.

215. 20 **Copyright Bulletin**, 1986, at pp. 15 - 20.

216. The suggestion of such reversal is very strong in the current trade related "reforms" of the international intellectual property system under **GATT** - See, Appropriate International Forums. Meeting the Challenges of the World Information Economy. Geza Feketekuty and Jonathan D. Aranson, Advance Technology Alert System (ATAS), Centre for Science and Technology Development, United Nations, New York, 1986; Technology, Trade Policy and the Uruguay Round, Papers presented at a Round Table at Delphi, Greece, United Nations Conference on Trade and Development - **UNCTAD**, Doc.ITP/23, United Nations, new York, 1990; Technology Selection, Acquisition and Negotiation, **UNCTAD** Doc.ITP/TEC/22.

217. For discussion of North - South Licensing of Intellectual Property Rights, see Chapter 4 of present work. Also **WIPO Licensing Guide for Developing Countries, WIPO**, Geneva 1977; Technology Transfer Mechanisms in the United

Kingdom and Leading Competitor Nations Innovation Working Party, National Economic Development Council, 1989, pp.11-17.

FOOTNOTES FOR CHAPTER THREE

218. This formal feature, in which the history of international technical co-operation programmes existed before only in an informal way under the "Colombo Plan", distinguishes, more than any other feature, the UNDP technical co-operation arrangements form those offered under other multilateral treaties such as the **LOME Convention** arrangements of the **Andean Pact** - See Chapter IV of this Work.

219. The Governing Council rejected graduation of members or co-operating States in 1970, See Portrait of the United Nations Development Programme, 1950 - 1985, UNDP, New York, 1985, at p.21.

220. Schachter in 1976 pointed out that what was striking about the concept of co-responsibility or sense of obligation was that "

> it is not so much its espousal by the large majority of poor and handicapped countries but the fact that it has been accepted ... by the more affluent countries to whom the demands are addressed as evidenced by (i) assistance to LDC's (ii) concurrence in resolutions;

See O. Schachter, **The Evolving International Law of Development** Columbia Journal of Transnational Law, 1976, pp.4-10; However, developed countries have largely resisted this sense of obligation. According to Dr. Herbert : A sense of obligation has won its way in the world to the effect that a wealthy country has a call of vague dimensions to provide means to assist poorer countries. [But] to give free admission to (it) would bankrupt us and demoralise others; [though] to ignore the obligation wholly would be out of accord with the effort in which we are engaged, to bring together the nations of the world in peaceful and co-operative understanding - See International Economic Outlook, Proceedings of the Academy of Political Science, New York 1953, at p. 53. Development, Human Rights and The Rule of Law, Report of the Conference held in the Hague, on 27th. April - May 1981, International Commission of Jurists, Pergamon Press (1981) for detailed discussion of the evolution of the right development as an international right. The basic goal of UNDP technical co-operation is to establish and/or promote, among others : Technological capacity self sufficiency, among LDC's through maximisation of external resources use while also encouraging Technical Co-operation among developing countries (TCDC) as well as proper "partnership" between newly "self-sufficient" countries and the established developed countries. See Technical Assistance in Brief, United Nations Department of Information, New York, 1954; Report of the United Nations Conference on Technical Co-operation Among LDC's 1978, Buenos Aires, A/Conf/79/13/rev.1, New York, 1978, s.8.

221· See Governing Council decisions DP/1989/5, and DP/1988/70, 34th. Session and 87/25 of 19 June 1987, 88/8 of 19 February 1988 and 88/31 of 1st. July 1989.

222· The EPTA was established under GAR 304 (iv), of 16 Nov. 1949 and was to involve other members of the United Nations family, and was to be financed by a special fund and was to be administered by the Technical Assistance Council and Board. The Programme was carried out jointly by the United Nations, the International Labour Organisation (ILO) , the Food and Agricultural Organisation of the United Nations (FAO), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the International Civil Aviation Organisation (ICAO), the World Health Organisation (WHO), the International Telecommunications Union (ITU), the World Meteorological Organisation (WMO), the International Atomic Energy Agency (IAEA) and the Universal Postal Union (UPU). EPTA was financed by the voluntary contributions of the Member states of either the United Nations or the participating Specialised Agencies, a mode of financing which has been diversified under the **UNDP**, See The Structure of United Nations Economic Aid to Underdeveloped Countries by Kirdar U, The Hague, Martinus Nijhoff, 1966; The Expanded Programme of Technical Assistance for Economic Development of Underdeveloped Countries, TAB1/Rev.4, The EPTA, UN 1964, Sales No.64.II.H.2.

223· **World Trade and Development Report, UNCTAD/TDR/7, 1987, at p.92.**

224· First United Nations Development Decade at Mid-Point, appraisal by the Secretary General, United Nations, New York 1965.

225· The TAB was established by the Administrative Committee on Co-ordination (ACC) on recommendation by ECOSOC under resolution 222A(ix) which invited the ACC to set up the Board, subject to General Assembly approval. The participating agencies included the United Nations Technical Assistance Administration (UNTAA) as the UN organ within the UN secretariat established to administer technical assistance in fields not covered by other agencies or falling positively within the scope of the United Nations and the International Atomic Energy Agency (IAEA)-For a detailed analysis of the juridical nature and functioning of the of the TAB, See , The Structure of United Nations Economic Aid to Underdeveloped Countries by Kirdar U, The Hague pp.30-63; and The World Bank since Bretton Woods: The Origins, Policies, Operations and Impact of the International Bank for Reconstruction and Developmen, by E. S. Mason and R. E Asher, 1973, Washington, D.C. Brookings Institution, at pp.564-565.

226· The Structure of United Nations Economic Aid to Underdeveloped Countries, Uner Kirdar, opcit. pp.25-28. 32. Note 5, pp.49-50; citing Article 1, Sect.1 of the Revised Standard Agreement, UNTS, Vol. 189, p.11.

227· For analytical discussion of the concept of Standard form Contracts in national legal systems, see Slawson W. David, Standard Form Contracts and Democratic Control of Law Making Power, Harvard L.R, Jan 1971, Vol.84 (1) pp.529-566; Trebilock, Michael J, The Doctrine of Inequality of Bargaining Power: Post Benthamite Economics in the House of Lords, U Tor. LJ, Fall 1976, Vol.26(4), pp.359-385; Kronhauser, Lewis. A, Unconsionability in Standard Forms, Cal. LR, Sept. 1976, 64(5) pp.1151-1183; Kesseler, Friedrich, Contracts of Adhesion, Some Thoughts about Freedom of Contract, Col. LR, July 1943, Vol.43(5), pp.629-642; Goldberg

Victor. P, Institutional Change and the Quasi Invisible Hand - J Law & Ec, October 4 1974 Vol.17(2) pp.461-492.

228· See Article VI sect. 2 of the Standard Agreement under EPTA, cited by UNER, opcit. at p.53.

229· For a discussion of the controversial concept of unequal treaties, see for instance - Unequal Treaty 1898 - 1997. China, Great Britain and Hong Kong's New Territories, by Peter Wesley - Smith, Oxford University Press 1980, rep. 1983.

230· Second Session of ECOSOC, Official Records, 41*rst* session, supp.No.11.A, June 1966 at para 178.

231· The country programme, which formed the basis for EPTA disbursal of assistance to a recipient country was the sum total of the number of expert advisors, consultants, trainers and fellowships, which could be financed each year out of the country's share of global "programme" resources, resources which could be deployed among those fields of activity which the recipient government considered most beneficial, Fifteen Years and 150.000 skills. An Anniversary Review of the United Nations Expanded Programme of Technical Assistance, prepared by the Technical Assistance Board, UN, NY 1965, E/TAC/153 REV.1, P.41.

232· The Expanded Programme of Technical Assistance, Uner opcit, P.14.11. Potrait of the United Nations Development Programme, 1950-1985, New York 1985, p.13.

233· Developing countries *were* often able to achieve parity with develop countries in international forums because of numerical strength and decision making by consensus or a two thirds majority.

234· For discussion of regional (bilateral - multilateral arrangements) see Chapter IV of this work.

235· See U.N.J.Y.B 1974 at p.25, quoted in Legal Problems of International Organisations by Felice Morgenstern, University of Cambridge, Research Center for International Law, Grotious, Pub. ltd. 1986.

236· For detailed analysis of the SUNFED proposals, See Report on the Special United Nations Fund for Economic Development, E/2381 (Nov.18, 1953), UN Sales No.1953 II.B.1; Uner, opcit at pp.202-224; The Issue of Capacity of Developing Countries to absorb Technical Assistance, UN Technical Assistance Committee, 5th report of the TAB, ECOSOC Official Records, 16th Session, supp. No.10, E/2433.

237· See GAR 724 (VIII) A.

238· For a detailed account of EPTA and UNSF, see The Structure of United Nations Economic-Aid to Underdeveloped Countries by Uner Kirdar , The Hague Martinus Nijhoff 1966.

239· See Second Session, June 1966, Ecosoc, Official Records, 41rst. Session, supp. No.11A at Para.232. The main functions of the Special Fund were:

(i) Surveying available resources and their economic potential for development

(ii) Strengthening or establishment of applied research institutes;

(iii) Promotion of better use of local materials and improvement of production techniques;

(iv) Establishment of Training Institutes;

See - The United Nations Development Decade at Mid-Point, appraisal by Secretary General, United Nations, New York 1965 p.13. In a Governing Council Debate a delegate expressed the view that Developing Countries, through the Fund, were, among other things, *"subjugated to private capital from abroad, which constantly sought outlets for its industries and went on to allege that "the establishment of the Special Fund had been designed to paralyse efforts to set up a special United Nations Fund for Economic Development, and the Special Fund's links with private capital were aimed at facilitating the exploitation of developing countries by monopoly capital"*; ECOSOC Official Records, 41rst Session, June 1966, Supp. No.11A, 2nd Session, para 232.

240· The term "conditionality", largely employed in reference to the International Monetary Fund Policies, was not defined in the original IMF Articles and is not a legal term of art, but describes a set of policies with no absolute standard. Under the first Amendment the objective of IMF policy was given under Article 5, S.3 (c) as *inter alia*, to assist member states to resolve Balance of Payments in a manner consistent with the purposes of the Fund and safeguard Fund resources. This policy has been frequently criticised not only for confusing "instruments" with "targets" but also for adopting policies and programs "carved in stone", which *inter alia*, assumed optimal growth rates, optimal expenditure distribution between the public and private sectors, lack of foreign exchange constraints on economies and optimal income distribution in recipient countries. On these "rigid" assumptions, the IMF offers technical assistance to requesting countries undertaking its programs,largely if such states are seeking to implement advice already given by the Fund e.g structural reform programs that the recipient country is embarking upon with financial resources made available under the IMF extended Fund facility. The country receiving assistance should have demonstrated ability on earlier occasion(s) to absorb Fund Technical assistance. Lastly, it may be noted that such conditionalities are imposed under Standby Agreements under which the Fund can ensure "efficient" use of its resources without the recipient having any significant power to negotiate the conditions of use of the resources that is the Standby Agreement, is not a multilateral instrument neither is it governed by international law but by the law of the Fund. See IMF Conditionality: Ineffectual Inefficient, mistargeted by John Spraos, International Finance Section, Essays in International Finance, No.166, Dec.1986 at p.27; Criteria for IMF Technical Assistance, Pamphlet Series, No.30, IMF Washington 1979 at p.16, Conditionality, by Joseph Gold, Pamphlet Series, No.31, IMF, Washington 1979 at p.2; Bretton Woods Revisited, Evaluations of the IMF and the IBRD, Conference Papers, Queens University, Canada, ed. Keith Acheson, J.F Chant and Martin.F.J.Prachowny, Mcmillan 1972; The World Bank Since Bretton Woods, Opcit. at pp. 539-41.

241· Under the agreement between the United Nations and the Bank, the Bank maintained the need for its independence and autonomy as an international organisation by virtue of, among others, "the nature of its international responsibilities and the terms of its articles of Agreement" and confidential information "which would otherwise interfere with the orderly conduct of its operations" would be with held by the Bank. The Bank"s institutions would accord

only due "consideration" to the inclusion on their agendas of items proposed by the United Nations etc. See Agreement Between United Nations and the World Bank, IBRD, Second Annual Meeting of the Board of Governors, Proceedings, (sept.11-17, 1974) pp.25-27.The Bretton Woods institutions were often accused of taking little or no recognition of the importance of economic development or trade as an engine of economic growth. According to Mr. Robert MacNamara, the World Bank criteria in disbursing a loan were (i) A loan must meet a high priority development requirement in the recipient country (ii) There must be a high rate of return (never less than 10%)(iii) There must be a clear indication of repayment - International Energy Negotiations...at p.41.According to the International Labour Organisation, much of the World Bank's freestanding Technical Assistance will probably continue to linked to structural adjustment and other policy related activities - See, The Role of the ILO in Technical Co-operation, International Labour Conference, 73rd Session, 1987, report Vi at p.10. Thus many LDC"s objected to the Jackson Report"s Recommendation of the use of the World Bank as the chief arm of the United Nations system in the field of capital investment, in spite of the Bank"s use of weighted voting and limited membership and sourcing of funds from private investors who wished to secure high interest rates contrary to developing country interests See **UNDP** Report of the Governing Council, 9th. Session, ECOSOC, Supp. No.6, United Nations, Jan. 1970, para 105; A Study of the Capacity of the United Nations Development System , by Jackson, vol.1 at p.21.

242· Under Article 57(1) of the United Nations Charter, the various specialised agencies, established by inter governmental agreement and having wide international responsibilities, as defined in their basic agreements, in economic, social, cultural, educational, health and related fields, shall be brought into relationship with the United Nations in accordance with provisions of Article 63. However, under Article 63, the ECOSOC may enter into agreements with any of the agencies reffered to in Article 57 that is specialised agency, defining the terms on which the agency concerned shall be brought into relationship with the United Nations.The IMF Agreement Between the United Nations and IMF of 15th. Nov. 1947 making the IMF a specialised agency simultaneously gave independent status to the Fund in its operational mandate since "by reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Fund is and is required to function as an independent organisation - See the Third World and Decision Making in the IMF by Tyronne Ferguson at p.58.Articles of Agreement of the International Bank for Reconstruction and Development - Dec 27, 1945, Amended Dec. 17, 1965, Article 1(i)The Purposes of the Bank are: (i) To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economics destroyed or disrupted by war, the re-conversion of productive facilities for peacetime needs and the encouragement of the of the development of productive facilities and resources in less developed countries.Though the Bank has evolved into a development institution, the implementation of this role has been limited by-

(a) limitation on membership that is the East European Countries were largely excluded

(b) the application of narrow criteria that is the "efficiency based" approach to development

(c)Weighted Voting, Article III, S.8 (a) : The Bank, within the terms of this Agreement, shall co-operate with any general international organisation and with public international organisations having specialised responsibilities in related fields. Any arrangements for such co-operation which would involve a modification of any provision of this agreement may be effected only after amendments to this Agreement under Article V (iii).

243. The United Nations and Domestic Jurisdiction of States, Interpretations and Applications of the Non-intervention Principle , by Goronwy. J. Jones, Cardiff 1979, at pp. 200 - 205.

244. The Structure of United Nations Aid to Under developed Countries, opcit, at p. 219.

245. Uner Kirdar, opcit, cites reservations to Basic Agreements as having been made by Yugoslavia, Turkey, Vietnam, Lebanon, Thailand, Laos, Ethiopia, Netherlands, Brazil, China and Egypt - at p.219.

246. The United Nations and Domestic Jurisdiction Of States , at pp.200 -204. In practice, decisions were made by consensus.

247. Under United Nations General Assembly 2029 (xx) para.2 : re-affirmed the continuity of principles, in relation to relevant UNDP activity, which had governed the EPTA and UNSF, if such principles were not inconsistent with the present resolution. Basic principles Governing the EPTA were set out in ECOSOC Resolution 222A (IX), Annex 1 and for Special Fund in Assembly Resolution 1240 (XIII) part B(I) (II) (IV) (V) para. 31 - 33. *The continuity of the Basic principles from the two Agencies by UNDP has been highly successful.* The Governing Council of the UNDP which constitutes the legislative arm of the programme, preserves the basic principles through the maintenance and observance of the principles of Universality, Voluntariness and Grant nature of assistance, Multilateralism and equality of members, respect for self-determination, and rejection of "cross - conditionalities" form other multilateral or bilateral financing institutions and agencies, See UNDP Report of the Governing Council, 15th. Session ECOSOC, Supp. No.2, 1973, para. 31.

248. Governing Council of the United Nations Development Programme, Report on the Organisational Meeting for 1989, The Special Session and 36th. Session, ECOSOC, Official records, 1989, E/1989/32, Supp. No.13.

249. Report of the United Nations Conference on Technical Co-operation among the Developing Countries, Buenos Aires, 1978 UN Doc. A/Conf/79/13/Rev.1; UNDP, from 1950 - 1985, at p.69.

250. The United Nations General Assembly during its 20th. Session, December 1965, having considered the United Nations Economic and Social Council (ECOSOC) recommendation contained in Resolution 1020 (XXXVII) of August 1964 which approved the merger of the United Nations Special Fund (UNSF) and the Expanded Programme for Technical Assistance (EPTA) into a single body, passed Resolution 2029 (XX) at its 20th. Session to allow the merger.

251. See 20th. Session , Official Records, opcit. note 250, Decision 1.

252. For example, the World Bank participates in the African Capacity Building initiative which is a joint effort of the African Development Bank, UNDP and the World Bank. The Executive Board of the World Bank approved participation by the Bank in inter agency training initiative which aims at strengthening the weak indigenous human and institutional capacities in Sub - Saharan Africa which are a legacy inappropriate investment and pricing policies, to enable nationals in the region to participate effectively as partners in their own developmental activities. The Institute, aims, inter alia, at (i) creating a consultative forum in which Africans can participate as full partners in their own developmental activities and the development of policies to promote capacity building goals (ii) establishment processes for co-ordinating capacity building initiatives, greater efficiency and effectiveness of on going "donor" efforts (iii) increase level of funding and resources available to enhance on-going capacity building interventions, as well as to finance promising new activities (iv) establishing systematic links between research and training institutions and governments to foster greater understanding between the two groups. See text of the Agreement Between the United Nations and the World Bank, IBRD, Resolution 124 (II) of UNGA 1947, Second Annual Meeting of the Board of Governors, Proceedings, 1974, quoted in The World Bank Since Bretton Woods, opcit, p.54 - 59, esp. p. 56.

253. Governing Council/UNDP, Organisational Meeting Report for 1989, opcit, note 248.

254. Governing Council of the United Nations Development Programme, Report on the Organisational Meeting for 1989, opcit, Decision 1 and 3. Structural adjustment is held in UNDP practice to include government efforts to (i) improve budget and debt management (ii) liberalise markets and pricing policies (iii) increase public sector efficiency (iv) strengthen entrepreneurial and export programmes (v) address social aspects of structural adjustment.

255. Technical co-operation projects and programmes co-ordinated by UNDP are government led exercises leading to the integration of UNDP co-operation activity into the development plans and priorities of recipient countries, though the UNDP programming process may serve as a frame of reference for any cooperative activity and assistance provided by or through the United Nations system if a member state or co-operating country so desires - See Governing Council of the UNDP, Report on the Organisational Meeting for 1989; the Special Session and 36th. Session, ECOSOC, Official Records 1989, E/1989/32, supp.No.13. Programmatic accountability is defined as the achievement of results or progress towards proposed objectives. Under current UNDP policy, technical co-operation should ensure *Social accountability* or *management by social objective*, defined as the extent to which specific social goals have been fulfilled in the performance of the project. Performance accountability refers to the procedures or methods used or applied when outcome or progress is difficult to evaluate. Proper systems of accountability always *aim at achieving equilibrium between independence and control, incentives and constraints, conflict and co-operation and benefits / rights and duties, and also involves material disclosure, proof, establishment of a set of minimum core requirements and norms of behavior, practice and decision making, independent reviews*, etc. For legal definition of the principle of transparency and accountability, See Chapter V of Current work.

256· The United Nations system has always emphasized, in principle, the urgency of the need to expand substantially the education and training of national personnel of developing countries especially through fellowships, training courses, seminars, the provision of teachers and instructors, study tours etc.As early as 1962, the Economic and Social Council urged the Technical Assistance Board (EPTA), the Special Fund and other organisations participating in the United Nations technical co-operation programmes to consider seriously for their 1963-64 Budget programmes and give priority to education and training as well as industrial development of LDC's-See ECOSOC, Official Resolution 898 (xxxiv) of ECOSOC, 1962, ECOSOC Official Records, 37th session, 3 July 1962, Resolutions Supp. No.1, United Nations, Newyork 1962, at p.11.

257· William Prynne defined fundamental rights of peoples in 1658 as:

(a) The privileges and Freedome of their Parliaments and their members;

(b) The safety and liberty of their persons;

(c) The propriety of their estates;

(d) The free course of common law, right, justice. Consequently, fundamental rights do not only encompass individual rights but also involve "non - interference" with the governance of peoples;

See Demophilos, or the Assertor of the Peoples Liberty by William Prynne Esq. Lincoln"s Inn , London, Prt. Francis Cole 1658. Also - Article 2(1) of the Declaration on the Right to Development provides:

> "the human person is the central subject of development and should be the active participant and beneficiary of the right to development".

According to **UNDP** development policy, the basic purpose of technical co-operation is the promotion of self - reliance in the recipient country in the managerial, technical, administrative and research capabilities in addition to the provision of the *traditional project package of foreign experts, fellowships and imported equipment.* The Declaration on the Right to Development GAR 41/128 OF 4th DEC. 1986, recognises the creation of conditions favourable to development of peoples and individuals is the primary responsibility of their states - Article 2(3) provides that states have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well - being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from, Article 3(1) states have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development. Also see - Potrait of the **UNDP** 1950 - 1985, New York 1985 at p.46; Popular participation in decision making for development, United Nations Report, Sales No.E.75.10 (1975) P.4.

258· The principle of *management by objective* is largely undefined in **UNDP** practice or policy. However, implementing specialised agencies such as UNIDO have given the principle an operational content that is that the principle operates in accordance with

the higher level development objective which is derived from the hypothesis that if the project objective is effectively achieved and is proper, then the development objective will be complied with, See - Design and Evaluation. A Manual of Policies. Procedures and Guide-lines for UNIDO, executed projects and programmes, vol.1, Projects 1984 at p.6.

259· For the Basic text of the **Standard Basic Assistance Agreement** (SBAA), see Doc. **UNDP/ADM/LEG/34** of 6th. March 1973; DP/107, Annex 1 of 7 April 1975.

260· Industrial Training (GAR 2090, 1965), Combating Hunger (GAR 2096, 1965), Natural Resources Development (GAR 2158, 1966), Stimulating Development Investments (GAR 2280, 1967), Scientific and Technological Development (GAR 2318, 1967), UN Conference on Science and Technology, Vienna, Australia 1979), Industrial Development (GAR 2528, 1969, UNIDO, Lima, Peru 1975), Facilitating Regional and International Regional Co-operation (GAR 2513, 1969), Fostering and Co-ordinating TCDC (GAR 3251, 1974, UN Conference on Technical Co-operation Among Developing Countries (TCDC), Buenos Aires, Argentina 1978).

261· See - **UNDP/LEG/SBA/Listing/1**, updated; and **UNDP**, Report of the Governing Council, 19th Session 15th. Jan. 3 February 1975, ECOSOC Official Records, 59th. Session, Supp. No.2, United Nations 1975, Para 165.

262· Uner, opcit., pp.55-59

263· **UNDP**, Report of the Governing Council, 20th. Session, 11-30 June 1975, ECOSOC, Official Records 59th. Session, Supp No.2A, E/5703/Rev.1, para 566.

264· See General Council of the United Nations Development Programme, Report on the Organisational Meeting for 1989, The Special Session and 36 Session, ECOSOC, Official Records 1989, E/1989/32, Supp.No.13, Part III - Co-ordination.

265· Forms of Assistance, SBAA, Article I.

266· Conditions for Project Execution, SBAA, Article III.

267· Privileges and Immunities, SBAA, Article IX.

268· Information Concerning Projects, SBAA, Article IV.

269· Participation and Contribution of Government in execution of Projects, SBAA, Article V.

270· Use of Assistance, SBAA, Article VIII.

271· Relation to Assistance from non - **UNDP** sources, SBAA, Article VII.

272· Suspension or termination of Assistance, SBAA, Article XI.

273· Article 4(a) of the SBAA, Provides, *inter alia*, that the **UNDP** may maintain a permanent mission, headed by a Resident representative to represent the **UNDP** therein and be the principle channel of communication with the government on all Programme matters. The resident representative "shall have" full responsibility and

ultimate authority, on behalf of the UNDP administrator, for the UNDP programme in all its aspects in the country. He shall assist the Government, as may be required, in the preparation of UNDP country programmes and project requests as well as proposals for country programme or project or project changes and assure co-ordination for all assistance rendered by the UNDP through various executing agencies or its own consultants.

274. The resource pool the UNDP consists of;

(i) Core resources;

(ii) Cost-sharing with both recipient and donor governments;

(iii) Trust funds;

(iv) Management services for bilateral and multilateral funding sources.
Governing Council of the UNDP, Report on the Organisation meeting for 1989, opcit - Annex, S (c) terms of reference for funding strategy.

275. See Chapter IV of the current work, in relation to **Lome Convention** arrangements

276. For instance the patent clause which was originally meant to make the benefits of discoveries available to all developing countries by means of arrangements in which the ownership of the discovery would pass into international public ownership. The clause would only apply to discoveries achieved through the sole efforts of a UNDP financed expert . Recipient states argued that such a provision could violate, inter alia, their national security and Sovereignty. However, the clause was modified into the current "information" provisions - Article 4 of the SBAA - which as we shall see provides for intellectual property rights to belong to the recipient Government under arrangements which would enable UNDP to get access to such rights for the purpose of making them available to other developing countries.

277. Consultant firms which sub contract to carry out UNDP supported projects, act under the instructions of and are subject to direction from the UNDP or its executing agencies, thus acquiring "agent" status rather than "independent contractor" status. The "restructuring Resolution" of 1978, inter alia, widened the responsibilities of the UNDP's Resident Representative under the title of "Resident Co-ordinator" which automatically meant a more central role for the Resident representative in the co-ordination of the UNDP recipient country relationship. For consulting organisations, the privileges and immunities extend to the "consulting organisation" and not the private individuals it employs. Such functional privileges and immunities are meant to establish a climate conducive to speedy and efficient execution of UNDP supported projects as provided for under Article 4 (a) of the SBAA. The special representative role of the Resident Representative that is his/her full responsibility and ultimate authority on behalf of the Administrator of UNDP for allocation and programming of UNDP resources in the country concerned other than resources and the central co-ordinating role for all technical co-operation activities, require diplomatic immunities and privileges to ensure effective execution of his/her duties, though the scope and extent of some of the privileges may be determined after "negotiation" with relevant Governments - UNDP Governing Council Report , 1989, paras 562 - 571.

278. Jackson, A Study of The Capacity of The United Nations Development System, Vol.1, p. 21, especially paragraphs 55 - 56.

279. **UNDP, Programme and Projects Manual,**1988, s. 20205, ss.1.0 (1).

280. **UNDP, Programme and Projects Manual** 1988, s.20205, ss. 2.0 (1) (4).

281. **UNDP, Programme and Projects Manual** 1988, s. 20205, para 3.0 (4).

282. The Indicative Planning Figure (IPF) is defined as : "An order of magnitude of the resources expected to be available from UNDP during a specified period for the financing of assistance to country and inter country projects, established for the purposes of forward planning and determination according to established criteria, the IPF does not imply a commitment to allocate funds up to the limit of the figure - UNDP, Programme and Projects Manual, 1988, Glossary of Terms.

283. Administrators Note : Each Country Programme with combined IPF and other resources of $ 10 million or more, taken into account in programming is submitted to the Governing Council with the Administrator's observations and recommendations contained in a note prepared by the regional bureau.

284. For discussion of this principle, See Chapter V of this current work.

285. **General Council, UNDP, Report of The Organisational Meeting** 1989, 36th. Session, opcit, Annex GC, Decision (6).

286. For the **Consensus** see Official Records, 49th. Session, 6.31, 1970, Resolutions, Supp. No. 1, E/4904; also GAR 2688 (XXV), Annex.

287. The UNDP, in principle favors liberal use of consulting firms, on a contractual basis, for the execution of the entire project or components of projects under the supervision of the executing agency. This alleviates "increasing" difficulties in recruiting qualified experts and enhances prospects for the timely delivery of project inputs - See UNDP, Programme and Projects Manual, 1988, S.30403, 1.0. UNDP collaboration with the private sector has especially been influenced , as discussed below, by World Bank policy, that is, from the very first developing country study undertaken by the Bank as executing agency - the Argentine Power Survey project , sub contracting by consulting firms, whether private or government owned, have always been *liberally* used since the Bank's long standing view, unlike some executing agencies like FAO and WHO, is that the use of consultants tends to provide, inter alia, teams of higher quality, to focus responsibility and Programmatic Accountability. The Bank maintains files on the experience, independence and capabilities of the firms, Edward Mason & Robert, opcit, pp. 308 - 309.

288. The liberalised regimes are supposed to provide, among others, incentives such as greater participation by non nationals in formerly reserved sectors E.g. under Nigeria's Companies and Allied Matters Decree (NEPD) 1976/77, the Schedules for enterprises which can invest in Nigeria are reduced from 3 to 2. Under the NEPD, Schedule I covered reserved sectors for wholly Nigerian owned enterprises, Schedule II covered 40% foreign and

60% local and Schedule III foreign investment. The 1990 Decree reduces these Schedules to 2, with Schedule I covering sectors with monetary limit in Naira 20 Million on foreign participation and Schedule II for mixed ventures (that is foreign + local or joint ventures) or separate investments, guarantees against nationalisation, internationalisation of contracts and acceptance of international arbitration, etc. The success of these measures largely depends upon the level of technological capacity and institutional bargaining capabilities of local enterprises. Also, see Trade and Development Report 1987, p.108 and Chapter V for discussion of the concept of mixed jurisdiction and Balance of Commitments.

289. See Chapter V of Current Work.

290. An example of such withholding of UNDP financial contribution is the case of the Food Packaging Centre, a project executed by UNIDO in the state of Sao Paulo, Brazil. The project was intended to improve the national packaging system by reducing food losses and minimising production costs, in order to meet the requirements of expanding the Brazilian foods and beverages. Though the project was approved in September 1988, the UNDP contribution was only released after participation of the privatised sector was guarantied in February 1989 - See General Council of the UNDP, 34th. Session (26th. May - 19th. June 1987) Item 5(b) of the provisional agenda, 4th. Country Programme for Brazil - DP/CP/BRA/4, 1987.

291. The issue of reverse transfer of technology is of significance to most developing countries and various initiatives have been instituted to counter the phenomenon - See among others, UNCTAD Report of the Fourth Meeting of Governmental Experts on the Reverse Transfer of Technology, 1988, UNCTAD DOC.TD/B/1169, 1988.

292. For the Text of the **Model Standard Letter of Agreement** between the Government and Co-operating Agency, See Programme and Projects Manual, 1988, s.30503, ss.5.3.

293. **Model Standard Letter of Agreement**, opcit, para 2.

294. **Model Standard Letter of Agreement**, opcit , para 5.

295. **Model Standard Letter of Agreement**, para. 14.

296. **Model Standard Letter of Agreement**, opcit, paras. 6 and 16.6. Brazilian Country Programme, opcit. para. 14 (a).

297. **Brazilian Country Programme**, opcit, para. 14 (c) and (f).

298. **General Council of the UNDP**, 35th. Session (6th. June - 1st. July 1988) Item 5 (b) (iii) of the provisional agenda, Country Programme for Uganda, DP/Cp/UGA/3, 1988, paras. 1 and 13.

299. Programme and Projects Manual, S.30602, ss.1.0 (1).

300· Activities and projects assisted by UNCDF, UNRFNRE, UNFSTD and UNSO may require different monitoring arrangements which are worked after consultations with the recipient government, **UNDP** and the relevant executing agency.

301· Programme and Projects Manual, S. 30602, ss.3 (a).

302· Programme and Projects Manual, S. 30602, ss.3(b) (c) & (d). The parties may monitor progress by examining, inter - alia, established indicators of progress, financial statements, technical and other reports, comparing records of completed tasks and outputs with forecasts in the work plan, physical examination of project operations etc.

303· Programme and Projects Manual, S. 20501, ss. 2(a) - (e).

304· Programme and Projects Manual, S. 30608, ss.1.0; DP/1983/ICW/6,22 December 1982.

305· Programme and Projects Manual, S. 30607, s.(3) & (4), S. 30609.

306· Programme and Projects Manual, S. 30608, ss.2.0(1) (a) - (e).

307· The term **Tripartite review** is used because it covers most **UNDP** practice. The principles developed under the "tripartite review" however, are also applied to bipartite (projects executed by government or UNCDF) or multi-partite (inter country, regional, inter-regional and global) agreements and arrangements - See Programme and Projects Manual, opcit., 1988, S.30604, footnote (a).

308· Programme and Projects Manual, Opcit, S.30604 (1).

309· Programme and Projects Manual, Opcit, S. 30604, ss. 3.0 (1) to (4).

310· Programme and Projects Manual, Opcit, S. 30604, ss. 5.0 (1) and (2).

311· Programme and Projects Manual, Opcit, S . 30604, ss.5.0 (4).

312· Programme and Projects Manual, Opcit, S . 20500, ss. 2.4 (iv).

313· Programme and Projects Manual, S. 30802, ss.2.0.

314· UNIDO, Report on the Industrial Development Board on the work of the 12th. session: General Assembly Official Records, 33rd. Session, supp.No.16 (A/33/16), UN 1978, S.173.

315. Programme and Projects Manual - S.30802, ss. 2.0 (4) (a).

316· Boththe developing countries - through the High Level Committee for TCDC - and the **UNDP** have laid emphasis on use of developing country capacities including experts, training capacity, consulting firms, local raw materials etc. in **UNDP** supported projects. Thus for example the programmeoffers preferential treatment, modelled on World Bank practice, by granting up to fifteen percent (15%) of quoted prices from developing country bidders when bids for equipment or services of consultants are evaluated under the international competitive

bidding system for supply of services and/or equipment to **UNDP** supported projects.

317· Speech by the Deputy Administrator, **UNDP**, Report of the Governing Council, opcit., s.566.

318· Article IV(5) of the Draft Basic Text of the SBAA, DOC.**UNDP**/ADM/leg 34 of the 6 March 1973.

319· SBBA, Article IV (I), UNIDO/IDB.1/9, Annex to Annex II, p.23.

320· Programme and Projects Manual - S.30601, ss.5.0 (1). 5. Programme and Projects Manual - S.30601, ss.6.0 (1).

321· Programme and Projects Manual - S.30601, ss.6.0 (2).

322· Programme and Projects Manual - S.30601, ss.6.0(3).

323· **Lima Declaration and Plan of Action on Industrial Development Co-operation**, PI/38, UNIDO, Vienna, June 1975; also Programme and Projects Manual, S. 30607, s.(3) & (4), S. 30609.

324· UN Director for Development Aid, UNGA, ECOSOC DOC.A/38/258, E/1983/82 pp 42 - 44.

325· Programme and Projects Manual, S. 20501, ss. 2(a) - (e).

326· ProgrammeandProjectsManual,S. 30608,section.1.0; DP/1983/ICW/6,22 December 1982.

327· Programme and Projects Manual, S. 30608, ss.2.0(1) (a) - (e).

328· Programme and Projects Manual, S.30200, ss.H (1).

329· Further measures in **UNDP** practice to assist the poorest countries include the acceptance of "non - convertible currencies, from the recipient Government to meet its assessed programme costs as provided for under Articles (V) and (VI) of SBAA. Article V provides terms for the recipient Government financial contribution and participation and co-operation in execution of projects assisted by the **UNDP** and Article (VI) provides for the recipient Government's payment for local costs or facilities in the amounts specified in the relevant project document or otherwise determined by the **UNDP** in pursuance of relevant decisions of its Governing Council . Though the recipient Government is supposed to meet the local costs of services and taxes including transport, telecommunications, salaries, medical, accommodation etc. for advisory experts and consultants assigned to projects in the recipient country , the General Assembly requested the **UNDP** , under GAR 2814 (XXVI) to exempt the least developed among the developing countries form the payment of local costs as long as required by their special situation.

330· Programme and Projects Manual, Opcit, S.30604 (1).

331· Programme and Projects Manual, Opcit, S . 20500, ss. 2.4 (iv).

332· The projects covered under the SIS are normally of the three - six months duration with a value not exceeding $75,000 and projects covered, except in exceptional cases, are national projects that is not inter country, regional or global.

333· Advanced developing countries have emphasised the"dangers" inherent in preferential treatment in view of the presence of under developed sectors in such countries. 80% of **UNDP** resources go to the poorest 65 developing countries, with LLDCs taking up to 30% of the resources; **UNDP**, Report of Governing Council, 9th. Session, Ecosoc, Official Records, 49th. Session; Britain's stake in the United Nations Development Programme, **UNDP**, July 1983.

334· For details of the "humanist approach" see **UNDP** Doc. DP/261, cited in **UNDP**, 24th. Session, ECOSOC Official Records, 63rd. Session, supp. No. 3A, UN 1977 (NY) E/6013/Rev.1 at Para.132.

335· See GAR.2953 (XXVII) of 11th. December 1972, para. 5; Programme and Projects Manual, S.30802. ss.1.0.

336· Lima and New Delhi Declarations and Plans of Action : Retrospective and perspective, UNIDO, ID/Conf.5/17 and ID/Conf.5/14.

337· Among the United Nations agencies, some have mandates which specifically call for their formulation and adoption of standards and procedures for the promotion of Human Rights. The agencies include ILO, WHO and UNESCO.

338· The International Covenant on Economic Social and Cultural Rights, especially Articles 13(1) and 15, signed and ratified by 95 states and signed by 5 states (that is The United States, Israel, Liberia, Democratic Kampuchea and Malta) as of March 1990 - Human Rights, Status of International Instruments as at 1st. March 1990, ST/HR/5.

339· **Declaration on the Right to Development** 1986, opcit..

340. The agencies such as FAO, WHO, ILO and UNESCO have a strong mandate, through the United Nations Charter, their Constitutional Documents, various resolutions and Declarations, to 'encourage' member states to implement multilateral and related human rights instruments. Most clearly, the International Covenant on Economic, Social and Cultural Rights (GAR 2200 A (XXI) of December 1966 - UN Doc. A/6316 (1966), Article 18 empowers the Specialised Agencies to make progress reports, within the scope of the agencies activities and powers, on the implementation of the Covenant. See also, Making and Breaking Human Rights, The United Nations Specialised Agencies and Implementation of the International Covenant on Economic Social and Cultural Rights by Philip Alston, 1979, Anti-Slavery Society, London.

341· **UNDP**, Report of the Governing Council, 19th Session, 15th. Jan - 3rd. February, 1975, ECOSOC, Official Records, 59th. Session, Supp. No.2, United Nations 1975, E/5646 at Para. 15.

342. Some agencies apply their own policy in this regard. Thus at the IBRD Fifth Annual Meeting of the Board of Governors (September 6 - 14, 1950) Summary Proceedings, Statement on Technical Assistance Activities of the International Bank, p.49 :

> "The Bank recognises that when it sends out...a mission it assumes a moral obligation to help, with its financial resources, in the development of the country concerned, provided that country does its own part in formulating and carrying forward a properly balanced development program."

Edward Mason and Robert, opcit, p.302.

343. See Article 2 (7) and Article 39, Chapter VII of the United Nations Charter, also Articles 13 (16), Article 62 (2) and (3) and Article 68 - The United Nations and The Domestic Jurisdiction of States , Interpretations and Applications of The Non - Intervention Principle, Gronmy J. Jones, Cardiff 1979.

344. J. L Brierly, The Law of Nations, 6th. Edition, edited by Sir Humprey Waldock, Clarendon Press, Oxford, 1963, at p.291.

345. For instance, under Article 11 (2) of the International Covenant on Social and Cultural Rights, 1966, the parties to the Covenant, recognising the fundamental right of everyone to be free from hunger .. under take to : (a) Improve methods of production, conservation and distribution of food by making full use of technical and Scientific knowledge.

346. **UNDP, Report of the Governing Council** 20th. Session, opcit, para. 571, Statement by Chief of UNDP Legal Services.

347. See for instance **UNDP Report of the Governing Council** 9th. Session, ECOSOC, Supp. No.6, United Nations, 1970, paras. 36 -38.

348. At its 357th. meeting, in approving the country programme for Israel, the Governing Council took note of the Administrator's assurance that : "the programme did not relate in anyway to any territories occupied by Israel and the Administrator would not authorize expenditure which could be construed as encouraging continuing Israeli occupation of those territories" - UNDP, Report of the Governing Council, 15th. Session, Supp. No. 2, UN, 1973, para. 15.

349. The rationale of facilitating the ability of the recipient country to implement economic, social and cultural rights vis-a'- vis a punitive stoppage of allocations, is illustrated by a statement made by the Chief of UNDP Division for Eastern and Southern Africa to the Resident Representative in Uganda in Uganda, that is : We note that many prospective bilateral donors have cited Human Rights violations as justifications for withholding development assistance to Uganda. It is possible therefore, that a small investment of UNDP funds in human rights area might pay a large dividend in increased aid flows" - See Letter dated 15th. July 1983 from the Chief of the UNDP Division for Eastern and Southern Africa to the resident representative in Uganda; in Report of the Secretary General on Advisory Services in the Field Of Human Rights Assistance to Uganda , UN DOC. E/CN/4/1984/5.

P.12 quoted in Human Rights and Development, International Views, David. P. Forsythe, Mcmillan, 1989.at p.130.

350. See New Technologies and Global Industrialisation - Prospects for Developing Countries, prepared by the regional and country studies Branch PPD.141, UNIDO 1989, at p.17, quoting Ergas 1987, at p.233; also, GAR Resolution 40/205 - Implementation of the Substantial New Programme of Action for the 1980"s for the Least Developed Countries- Annex, Part 1 (B) (18) stresses the development of Human Resources as an essential pre-requisite for the development of the least developed countries - General Assembly, Fortieth Session, Resolutions and Decisions, 17th. Sept.- 18 Dec. 1985, 28th. April - 20th. June 1986, Supp. No.53 (A/40/53) UN, New York 1986.

351. For an analytical review of the **UNDP** financing process - See Legal Features of Multi-bilateral Aid by Sergio Marchisio in The Italian Year Book of International Law, Volume 7, 1986 - 1987.

352. The 566th. meeting of the General Council, 4th February 1977 expressed deep concern over the limited resources availablefor programme purposes in 1977. In the 1970"s, Governments agreed to a 14% growth a year in money terms for **UNDP**, a commitment not fulfilled.

353. Government Council of the United Nations Development Programme, Report of Organisational meeting for 1989, the Special Session and 36th. session, Official Records 1989, E/1989/32. supp.No.13, Annex, Terms of Reference for funding strategy item (c).

354. The Start of International Development Co-operation in the United Nations 1945 - 1952 by Jaap Van Soet, Van Gorcum Assen, 1978 at p.84.

355. The United Nations and the domestic Jurisdiction of states - pp.196-198.

356. For a discussion of the issue of obligations in international law see - The question of a reference to International Obligations in the United Nations Code of Conduct for Transnational Corporations, A different View, Detlev F Vagts, **UNCTC**, Series A No.2, September 1986 and Barcelona Traction Case (I.C.J. Rep 1964, p.6), also

357. The need to preserve international Competitive bidding on a multilateral basis was stressed by the **UNDP** - **UNDP**.DOC.DP/1982, BFC/L.3 Add.22, June 1982.

358. The evolving International Law of Development, O.Schachter, Columbia, Journal of Transnational Law, 1976 pp.4 -10.

359. Programme and Projects Manual, Opcit, S.20100, ss. 7.2 (1).

360. SBAA, Articles V and VI.

361. See Programme and Projects Manual, S.30803, ss.4.0.

362. SBAA, Article III (2).

363. United Nations Development Programme, Report of the Governing Council, 19th Session, 15th. Jan 3 Feb.1975, ECOSOC Official Records, 5th Session, Supp. No.2, UN 1975, Para 167. In 1966, the Administrator of the Programme noted that the work of "development assistance" could only be successful when it involved the *full participation* by LDC's themselves - **UNDP**, Report of the General Council, first session, Jan 1966, ECOSOC, 41rst Session Supp. No.11 at para 25.

364. Decisions of the General Council, 20th. Session during which it was decided to implement the "new dimensions". Also see - Coherence of the United Nations Development System , Official Records of the ECOSOC, 31st. Session, supp. No.2A, E/5846/Rev.1

365. The Country Programme is a multi year framework of country focused technical co-operation efforts which indicates the proposed use of **UNDP** resources towards the achievement or furtherance of selected national development objectives during the period covered by the country programmes, **UNDP**, Programmes and Project Manual, February 1988, Glossary of terms.

366. A Study of the Capacity of the United Nations Development System at p.21-27.

367. See **UNDP** Report of the Governing Council, 15th. Session ECOSOC, Supp.No.2, 1973 especially Para.31.

368. Thus according to the Under Secretary in the Ministry of Economic Planning and Development, Zimbabwe;

> "...the concept of a country programme in itself has an impact [We] can sit down and plan, and that relieves the pressure from other parts of the Administration.We can map out a strategy and distribute our resources..."

See - Britain's stake in the United Nations Development Programme, **UNDP**, The Development Connection, 1983 at p.10.

369. SBAA, Article XII (2).

370. For example, the IBRD, the Board of Governors has the right, under Article V(2) of the Bank's Articles of Agreement, suspend membership of any member state which fails to fulfil any of its obligations to the Bank, by decision of a majority of the Governors, exercising a majority of the total voting power.

371. The Bank at this time carried the policy that its function was not to convene conferences, collect figures, set standards etc. but to make loans; for the agreement between the IBRD and United Nations, see - IBRD, Second Annual Meeting of the Board of Governors, Proceedings (September 11-17, 1947), pp.25-27, quoted in Edward & Robert at p.58.

372. **UNDP** report of Governing Council, 1st. session , January 1966, ECOSOC, Para 52.

373. **UNDP**, Report of the Governing Council, 9th. Session, ECOSOC, Supp.No.6, UN, January 1970, especially para.131.

374. Britain's stake in the United Nations Development Programme (**UNDP**), July 1983 at p.28.

375. Governing Council of the United Nations Development Programme - Report of the Organisational meeting for 1989, The special session and the 36th. session, ECOSOC, Official records 1989, E/1989/32, Supp.No.13, part III, Decision 4.

376. See infra notes 377 and 378.

377. For Draft Agreement, see, Industrial Development Board, 1st. session (part two), Vienna 4 -15 November 1985, Item 8 of the provisional agenda, DOC.UNIDO.1/9, 10th. September 1985.

378. Special interest or co-operative arrangements have been established the **UNDP** and : The World Bank; Asian Development Bank (AsDB), African Development Bank (AfDB), Caribbean Development Bank (CDB), IslamicDevelopment Bank(IsDB), European Economic Community (EEC), International Fund for Agricultural Development (IFAD) and Nordic Investment Bank (NIB).

379. Programme and Projects Manual, S.30901, ss.1.0 (2).

380. **Lima Declaration and Plan of Action on Industrial Development Co-operation**, opcit note 323.

381. Belgium, Canada, Federal Republic of Germany, Israel, Italy, Japan, UK and Northern Ireland, Report of the Second General Conference, U/CONF.3/31, UNIDO, Vienna 1975, p.70.

382. Agreementbetween **UNDP**and UNIDO, (Draft) Doc.UNIDO/IDB.1/9, Annex II.

383. Preamble to Agreementbetween **UNDP**and UNIDO, opcit, note 382.

384. Agreement, opcit., note 382.

385. Agreement, opcit., note 382, Article, XI (I).

386. Agreement, opcit., note 382, Article III.

387. Agreement, opcit., note 382, Article, V (2).

388. Agreement, opcit., note 382, Article, XI (5) & (6).

389. Draft Agreement, Industrial Development Board, First Session (part two) Vienna, 1985, UNIDO/IDB.1/13, Annex I, Article IV (7).

390. See Legal Features of Multi-bilateral Aid by Sergio Marchisio in The Italian Year Book of International Law, Volume 7, 1986 - 1987 for a discussion of the unilateralist trends of developed country technical assistance contributions.

FOOT NOTES FOR CHAPTER FOUR

391. For definition and discussion of this term, see, *inter alia*, Legal Features of Multi-bilateral Aid by Sergio Marchisio in The Italian Year Book of International Law, Volume 7, 1986 - 1987.

392. Excerpt from speech by Michel Rocard, Prime Minister of the French Republic, President of the Council of the European Community, at Lome (Togo), 15 December 1989, at the signing of the Fourth Lome Convention, quoted in The Courier, No. 120, April 1990 at p.5.

393. Excerpt from speech by Michael Sefali, President of the ACP Council of Ministers at Lome (Togo), 15 December 1989, at the signing of the Fourth Lome Convention, quoted in The Courier, No. 120, April 1990 at p.7.

394. From Lome 1 towards Lome 2. Katharina Focke, Texts of the Report adopted by ACP - EEC Consultative Assembly - 1980, citing statement by J. E. David to the Club of Dakar on the Transfer of Trade Technology, at p.20.

395. From Lome I to Lome IV, View Point by Lucien Pagni on the signing of Lome IV, The Courier, No.120, April 1990 at p.17; "The effects of the Lome arrangements are the severest criterion for judging the Conventions, since the Conventions are not an end in themselves but a means" - Zartman, in - The European Community's Development Policy: The Strategies Ahead. College of Europe, 1986, p.65;

396. See Chapter III of current work.

397. The Lome Convention, now in its fourth phase, is an update of the 1963 Yaounde I Convention (EEC - and 18 AASM's or associated African States and Madagascar), 1969 Yaounde II Convention, (EEC - 20 AASM's), 1975 LOME I (1975) Convention (EEC - Afro - Caribbean and Pacific States, ACP)[1976] O.J.L 25/2, LOME II 1979, [1980] O.J.L 347/2, Lome III and IV. The Fourth Lome Convention has 69 signatory ACP states. For a full text of current Lome IV Convention, see, **Compiled Texts of the Fourth Lome Convention**, signed at Lome 15 December 1989, ACP - EEC Council of Ministers, Doc. BX - 71 - 91 - 073 - EN - C (catalogue number), Official Publications of the European Communities, Brussels,1992; The Courier (Magazine), No.120, March - April, 1990.

398. For a detailed analysis of the national and regional regulatory measures used in the Andean Pact countries until the mid-1980's, see Transfer of Technology in Latin America, a Decade of Control, by Carlos M. Correa, JWTL 1981; and for new reforms in this region to take into account international legal obligations see - Chapter V of this current work; Latin American Integration and Enterprise for the Americas Initiative, Eduardo Gitli and Gunilla Ryd, JWTL, August 1992; Private Investment in Latin America, Re negotiating the Bargain, Joseph .J. Jova, Clint .E. Smith and T. Frank Crigler (1984), Private Investment in Latin America, Texas International Law Journal pp 3 - 32; Regional Industrial Co-operation, Experiences and Perspectives of Asean and Andean Pact United Nations Industrial Development Organisation, UNIDO.ID/309.

399. The Lome Convention, opcit, note 397.

400. The Europe Asia, Latin America Dialogue: Financial & Technical Co-operation 1976- 1989, Commission of the European Communities, Olivier Retout, 1991 at p.10.

401. See Part IV of the Fourth Lome Convention.

402. Community Development Policy, an Unknown Quantity? **European File**, August - September 1990.

403. See- Annual Report of the ACP - EEC Council of Ministers, April 1977, at pp.6 - 7; Gamble and Frankowska , International Law's Response to the NIEO, An Overview 9 B.C.I.C.L.R, 257, 274 (1986); Benedek - The Lome Convention and New International Law of Development : A Concretisation of the New International Economic Order ? 26 Journal of African Law, 74 (1982).

404. See *inter alia*, **GATT - Trade Policy Review**, The European Community, Volume I, 1991 at pp.67 -70.

405. The use of this term, as explained below, is different under the Lome Convention from that under the **UNDP** programme. Under Lome, the term is synonymous with technical aid flowing from and determined by the Community, aid in which the recipient states nationals, institutions and enterprises are often participate only as "sleeping partners".

406. The Report cites the Financial protocol under Lome IV which provides for ECU 6,215 million for 1990 - 1995. This sum is to be used for national and regional development programmes, *structural adjustment* export earnings stabilisation in the fields of agriculture (STABEX) and mining (SYSMIN) and emergency relief.

407. In principle, ACP exports are granted unrestricted and duty free access to the EEC market, except for agricultural products which are subject to the Common Agricultural Policy of the Community, textiles and clothing and European Coal and Steel Community Products, Lome IV Title 1, Trade Co-operation, Article 177 and Protocol 9, article 3; also Part Two, Title X, Lome IV Convention; **Trade Policy Review**, The European Communities 1991, **GATT**, Geneva 1991, Volume 1, p.68.

408. Under the STABEX arrangements in the Convention, ACP states are provided with the right to be compensated by the EEC for shortfalls in their export earnings from specified primary products, under certain circumstances and up to given limits - See Part Three, Title II, Chapter 1 of Lome IV, Articles 186 - 212, for the special financing facility for mining products (SYSMIN), Chapter 3 of same title, Articles 214 - 219, and for the special undertakings on sugar, Chapter 2 of the same title, Article 213.

409. See Part Two of Lome IV, Titles I - XII, covering environment, agricultural co-operation, food security and rural development, development of fisheries, co-operation on commodities, industrial development, manufacturing and processing, mining, energy, enterprise, services and trade development,

410. Access opportunities under some protocols such as beef and veal are confined, by various health, voluntary export restraint (agreed quantities in Convention language) or quota system, to a few countries. Under other protocols dealing with high or fairly demanded products which suffer no competition from EEC common agricultural policy products,"unlimited" traditional market access is guarantied - E.g Banana Protocol Article I provides that "no ACP state shall be placed, as regards access to its traditional markets and its advantages on those markets, in a less favourable position than in the past or present".

411. E.g Lome IV, Title III, Chapter 1, Section 2, Article 221

412. The various Declarations annexed to the Convention deal with definition of appropriate technology and copyright.

413. Part IV of the Treaty of Rome Articles 131 - 136, provides for associate states, thus formalising the maintenance of EEC states traditional links to former possessions. Part IV of the treaty also set up the European Development Fund which provides resources for Community Financial and Technical Co-operation and the bulk of resources for funding Lome Convention generated activity.

414. Though initially challenged as contrary to Article 1 of **GATT** since it did not constitute a free trade area as defined under Article XXIV, objections to the Convention were gradually abandoned, especially due to the eventual non realisation of increased ACP share in the EEC market - see **Europe and the Developing World, Association under Part IV of the Treaty of Rome** by William Gorell Barnes.

415. While ACP states are required to observe the need for national treatment, the EC safeguards itself from making binding commitments to offer MFN treatment to ACP states at all times, see Annex XXXIX which sets out the ACP declaration on Article 168 of the Lome IV Convention to the effect that the Community would offer ACP products treatment equivalent to that offered to third state products, to avoid MFN treatment which would cause imbalance and discriminatory effects.

416. Lome IV, Title 5, Articles 77 - 98, especially (with Article 97 on the special needs of the least developed countries.

417. Lome IV, especially Articles 87 and 97.

418. For typical terms of agreements concluded under such treaties, see - Bilateral Agreements on trade and Economic Co-operation Concluded by Developing Countries, Volumes I and II by Alfredo Castillo - Gomez, **UNCTAD**/ST/ECDC/36, 1988.

419. See Financial Protocol, Lome IV.

420. Under general co-operation provisions, information and documentation instruments, particularly for the exchange of know-how, methods and experience between ACP states and between them and the Community are to be set-up (Article 276) and ACP-EEC universities, research and training institutions are to be "twinned" (Article 276).

421. Lome IV Convention, Article 275 (a) and (b).

422. Lome IV Convention, Article 275 (c) and (e).

423. Lome IV Convention, Article 275 (j).

424. Lome IV Convention, Article 279.

425. Agriculture is recognised as a sector closely linked with the EEC economy as a whole. Therefore the rules which govern agriculture derogate from those governing the common market and there is no co-ordination at the Community level of the various national policies but of the one policy at Community level - Law and Institutions of the European Communities, 5th. Edition, Butterworths by D. Lasok, J. W. Bridge at p.480.

426. A very favourable assessment of the European Investment Bank's activities in the ACP states is made by Philippe Bourin in his article - The European Investment Bank's Activities in the African, Caribbean and Pacific under Lome III, in Current Issues in International Business Law, edited by David Perrott and Istavan Pogany, Avebury 1988.

427. Resolutions of the ACP - EEC Joint Assembly on 22 March 1990, Port Moresby Papau New Guniea, 67 for, 20 Against with 4 abstentions, in Annual Report of the ACP - EEC Council of Ministers (1990), Luxembourg 1991, Annex 1.

428. The Council of Ministers Decisions are binding on the contracting parties can only conduct valid proceedings if half the members of the Council of the European Communities, one member of the Commission and two thirds of ACP government representatives are present - Article 339 (1) of Lome IV Convention.

429. In principle, the Lome Conventions are not short of *declarations* of equality between the co-operating states. For example, with reference to technical co-operation - Lome IV, Chapter 4 section 295, Article 295; Article Lome II - Annex IX and Article 64.

430. During the negotiations to form the first Lome Convention, an ACP request for a separate fund to facilitate industrialisation and technology transfer was "denied" by the Community. The subsequent Centre for Industrial Development (CDI), is situated in Brussels where it is supposed to encourage or promote links between the private sectors in the EEC and ACP states - See The Lome Conventions and their Implications for the United States, Joanna Moss, west view 1982.

431. The UK technical co-operation or assistance programme was generally regarded as more beneficial to recipient states than that of other EEC states, yet the recipient states participation in decision making, actual technical activity, setting of terms and conditions by the recipient state even in these cases was reduced to a minimum, the recipient states being required to give guarantees of non - interference with technical personnel from the working in the recipient country. Such guarantees typically concerned non taxation and personal immunities for skilled personnel - See for example : Agreement Between the Government of the UK and Sudan, Concerning the provision of certain Technical Assistance by the UK, April 1970, CMND 4599, 1970 - 71 XLII, Treaty Series Number 11 (1971); Agreement on Technical Co-

operation between the Government of the United Kingdom and Egypt, November 1974, CMND 6264, Volume XXXIV, 1974 - 1975.

432. Under article 325 of Lome IV, a joint ACP - EEC Development Finance Co-operation Committee is established within the Council of Ministers. The Committee has a wide ranging mandate which includes review and examination of issues such as conditions of award of contracts to ACP enterprises - Art. 325 (i), promotion of ACP - EEC private foreign investment and flow of private capital - Art. 325 (k) - (m), etc.

433. See Articles 158 and 159, among others, Lome IV Convention; also Chapter 3 on UNDP Technical Assistance for discussion of formal provisions and mechanisms under country programmes.

434. Lome 4, Chapter 5, articles 281.

435. Lome 4, Chapter 5, articles 281 - 293.

436. Under the general safeguard clause - Article 177 of Lome IV, market access may be withdrawn (i) if serious economic disturbances" in a sector of the EEC or of member states; or (ii) difficulties which jeopardise external financial stability or which may result in deterioration thereof. For the technologically more important coal and steel products, if the conditions of competition from the ACP suppliers as regards prices are likely to be detrimental to the functioning of the common market, the EEC can unilaterally "withdraw" concessions Protocol 9, Article 3 of Lome IV.

437. The basic rule of rules of origin (Title 1, Protocol 1, Lome IV) is the requirement for a change of tariff heading as between the materials used and the finished product. Specific product working and processing requirements may also be imposed by the Community if it considers the product insufficiently covered by the general rules. Proof of origin (Title II, Protocol I, Lome IV). See also Nigeria - **Trade Policy Review, GATT**, 1991, Volume II at pp.50 -51.

438. Lome IV, Title 1, Article 168 - 169 and Annex II of the Treaty.

439. EEC Commission (1989) Fourth Lome Convention, Information Memo, Brussels, 13 December, 1989.

440. See for instance - Foreign Direct Investment and Technology Transfer in India, UNCTC/Doc. ST/CTC/117, United Nations, New York, 1992. The advanced developing countries are now capable of importing only capital since local technological capabilities are sufficient.

441. This point is made in an economic analysis of this problem - The Impact of 1992 and Associated Legislation on the Less Favoured Regions of the EEC, Regional Policy and Transport Series, 18, European Parliament (Directorate) at p.39.

442. The Second enlargement of the European Economic Community, The Integration of Unequal Partners edited by Dudley Seers, C. Vaitsos 1982, at p.237.

443. Mytelka K. Lynn and Dolan Michael: The Lome Convention and a New International Division of Labor, Journal of European Integration, Volume I, Number 1, 1977.

444. Under Article Chapter 3, Section 1, Article 258, ACP states and the Community (that is in effect ACP states) are to implement measures that encourage participation in their development efforts by private investors who comply with the objectives and priorities of ACP - EEC development co-operation and with the appropriate laws and regulations of their respective states.

445. Lome IV, Chapter 4, Section 5, especially Articles 294 (1) and 297.

446. Lome IV, Title III, Chapter 1, Article 230 (2) (c); Also Chapter 4 of the same Convention, Article 275, especially clause (c).

447. This approach is also applied to the ad hoc arrangements made with Latin American - See The Europe Asia Latin America Dialogue : Financial and Technical Cooperation , 1976 -1989, Commission of The European Communities, 1991, at p.35.

448. Report of Article 108 Committee of 24 th. April 1986 on specific and general difficulties of implementing financial and technical co-operation, at section vii (ii), In EEC Council of Ministers, Compilation of Texts Relating to ACP - EEC Financial and Technical Co-operation , DOC BX- 71-91-073-EN-C, Official Publications of The European Communities, Brussels, 1992.

449. Opcit, note 448.

450. Opcit note 448.

451. Opcit note 448, at p. 235.

452. General criteria for EEC supported projected implementation have for long included theoretical requirements for those implementing projects in ACP States to take into account adaptation of technical components to economic and social conditions of the country or territory concerned - See for instance, EEC Regulation No.7 - Official Gazette of the European Communities of the 25th. February 1959, Article 24.

453. Under Article 296 of Lome IV, non ACP - EEC enterprises or even third countries, may be authourised to participate in contracts financed by the Community, if , inter alia, such non ACP -EEC enterprises are more competitive in terms of pricing , delivery times, offer better adapted technology, etc. However, in practice, it is unlikely that such EEC firms which have a first opportunity to tender and bear the goodwill of the donor states, will be rejected by an ACP recipient state. However, if this provision was implemented, it could offer ACP states the opportunity to access

cheaper and better adapted technology from advanced developing countries, including a "new" South Africa which is currently not a member to the Convention.

454. See **Chapter 5** of current work.

455. The EEC holds a presumption that private party, commercial technology transfer on terms "freely" agreed between parties forms the ideal basis for technology transfer. Little research, especially in relation to ACP states, has been undertaken to prove this contention - See The Political Economy of European Community Relations with African, Caribbean and Pacific States. Contributions to the Understanding of the Lome Conventions on North - South Relations. edited by Frank Long, Oxford 1980, at p. 126.

456. Economic and Social conditionalities are now a permanent component of EEC official aid policy. The conditionalities include requirements for observance of certain economic policies such as structural adjustment, social policies such as human rights etc. - See, Decisions of the European Community Development Ministers, December 1991.

457. The European Economic Community Convention of Association between the European Community and African Malagasy states associated with Community, London, HMSO's 1965, (Yaounde Convention), Doc. 64/346/EEC.

458. For discussion of a legal framework that guarantees transparency, formal consultation, safeguards etc. see Chapter 3 of current work (**UNDP**).

459. The Community's Development Co-operation Policy Encompasses a range of tactics, resources and instruments - European Development Fund Procedures, Collection Dossiers Number 4, Brussels 1981 pp. 6 - 8.

460. See Part Four of Lome IV, articles 338 - 352, and articles 30 -1

461. These include the Centre for Development of Industry, European Investment Bank,

462. The Bank was established under the Rome (EEC) Treaty (1958), Article 129 to finance capital investment projects that promote the balanced development of the Common market in the interest of the Community - Rome Treaty, Article 130 . Under article 18 of the Bank's Statute (a protocol integral to the Rome Treaty), the Bank may operate in non member countries. Consequently, under previous Lome Conventions, the Bank has operated in ACP states, and the current Fourth Lome Convention, it manages 20% of total assistance under the five year Protocol.

463. The European Investment Bank. Financing Facilities under the Fourth Lome Convention. European Investment Bank Publication, 1991; Articles 233-238, especially Article 236 of Lome IV Convention; 20th. General Report on the Activities of the European Communities, 1986, point 941.

464. See Article 12 of the Internal Agreement.

465. Indicative Programmes specify, *inter alia* : (i) The main sector to be assisted; (ii) Measures necessary to achieve the development objectives of the sector(s); (iii) Time

table for implementation; (iv) Project proposals for regional projects; (iv) Support for structural adjustment - where applicable.

466. European Investment Bank. Annual Report 1985, p.113.

467. Article 307 (a) - This provision recognises the right of recipient states to regulate transactions occurring on their territory, under their national law, See - Chapter V of current work.

468. See Annex XXXIX of Lome IV Convention, which allows the EC to apply a third - country preferential treatment to ACP products which, if offered MFN treatment would cause imbalance or discriminatory effects on the Community market.

469. See Article 356 of Lome IV Convention.

470. Preamble to **Decision 84**, Andean Commission; For the Common Investment Regime and Technology Licensing Code, See 27 **I.L.M** 974 (1988).

471. For the Common Investment Regime and Technology Licensing Code, See 27 **I.L.M** 974 (1988).

472. Article 5 of regulations.

473. For a discussion of the value of evaluation and assessment of technology transfer and development of technology contracts in mitigating bargaining and negotiating power disparities - See Chapter V of this current work.

474. Correa refers to the rights and obligations of the parties as reciprocal duties. However, this term does not indicate the frequent need for preferential treatment by the recipient to ensure balance of entitlements - See Correa, **Transfer of Technology in Latin America**, opcit., at p.394.

475. For modifications of this and other requirements, to *inter alia*, take into account international legal obligations and legitimate rights of technology owners, see - Chapter 5 of Current Work, and Commission of the Cartagena Agreement Decision 220, reproduced in ICSID, Foreign Investment Law Journal, Volume 2, Number 2, fall 1987.

476. See also **Decision 313** of February 1992, amending **Decision 311** of December 1991 which modified **Decision 85**. **Decision 313** Articles 1 - 52 dealing with patents and Articles 52 - 70 dealing with utility models have not reversed the provisions of the joint technological policy but have only modified them in respects like recognition of intangible property as a separate item of "transfer".

477. Such a development is in accordance with the progressive ability of each state member state to the Andean Pact to control its own technological development within the framework of interdependence. Thus the major industrial property owning state in the sub-region, that is Venezeula, which did not adopt Decision 85, can exercise greater discretion in implementing its technological policy E.g the offer of higher levels of protection to third countries, without defeating common goals - See **WIPR**, Volume 16, p. 119.

FOOT NOTES FOR CHAPTER FIVE

478. Law and Politics of West - East Technology Transfer, edited by Hiroshi Oda, Martinus Nijhoff, Graham and Trotman, 1991.

479. See Policies, Laws and Regulations on Transfer, Application and Development of Technology: **UNCTAD/ITP/TEC 16**, 1990 and rest of text in current Chapter.

480. The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea and Final Act of the Third United Nations Conference on the Law of the Sea, Croom Helm, 1983, United Nations, especially Articles 203, 207, 208(3), 266 and 269(b).

481. Under Article 42 of the Convention, an arbitral tribunal must decide a dispute in accordance with rules of law agreed by the parties which can therefore be the law of the host state, thus the practice that a host country's relationship with foreign technology owners or suppliers, among others, will be governed by the law of the recipient state, is not inconsistent with the Convention - See **News From International Centre for Settlement of Investment Disputes (ICSID)**, Volume 1, Number 2, 1984 at pp. 2- 3.

482. For an economic review of this period, see, International Investment, Edited by Peter J. Buckley 1990, especially pp.38 & 166.

483. For example the British Industrial Property System continued to be applied by many former British territories in Africa. Reform of laws in such countries does not automatically terminate the application of the foreign 'controlling' system in practice - See 5 **World Intellectual Property Reports**, Volume 5, No.9 at p.231 and chapter on industrial property system.

484. Bilateral Investment Treaties, United Nations Centre for Transnational corporations, UNCTC, ST/CTC/65, especially pp.346 - 351; Collection of Treaties, Alliances and Conventions relating to Security, Commerce and Navigation of the British Dominions, London, .S. Buckley (Printers) 1717; State Responsibility and Bilateral Investment Treaties by M. Sornarajah, p.80; Technology Trade, Joint Hearings before the Committee on Science and Technology and the Committee on Interstate and Foreign Policy of the Committee on Banking, Finance and Urban Affairs, United States House of Representatives and the House Task Force on Industrial Innovation, 96th. Congress, June 1980.

485. See Uganda Industrial Charter, Sessional Paper No.1, Second Session (1964), **Uganda Foreign Investment Protection Act** 5 Laws of Uganda Cap.160 (1964).

486. Re - Orientation of Industrial Strategy in Developing Countries and selection and Application of Industrial Technology, Papers Reviewed at United Nations Industrial Organisation (UNIDO) Second Consultative Group on Appropriate Technology, UNIDO Secretariat, ID/WG.279/4, 1978; British Overseas Investment in the nineteenth Century by P. L. Cotrell, Economic History Society, 1975.

487. See **Chapter 2** of this work on the Multilateral Industrial Property System and its traditional impact on Technology Transfer.

488. View taken by, among others, Oscar Schachter, in **Review of The United Nations Code of Conduct For Transnational Corporations**, Hearing Before the Sub-Committee on Human Rights and International Organisations of the Committee of Foreign Affairs, House of Representatives, 100th Congress, 1987 at p.36.

489. Concessions have continued, when the negotiating and bargaining power disparity is wide, disguised under more equitable names such as joint ventures. For example, the United African - American Corporation (UACC) established in 1953, adopted the label of "Joint Venture" (LAMCO -JV) 1960, though only one quarter of the produced surplus remained at the disposal of the Liberian Government while the rest was transferred abroad - See **Contract Law, The Free Market and State Intervention** by Robert Siedman, In The Political Economy of Law, opcit, note 32.

490. See For instance, Legal and Institutional Arrangements in Minerals Development, Mining Journal Books, 1982, at pp. 56 - 57.

491. Report of the 48th. Conference, International Law Association, New York 1959, Contribution by Dr. Tatian Guldberg (Sweden) , pp. 172 - 174, also other 237 - 238.

492. International Law Association Report of the 48th. Conference, opcit, note 491.

493. See **Carlston, International Role of Concession Agreements** 52 NW, U.L.Rev 618, (635), 1957.

494. Innominacy occurs in technology contracts if the agreement is adapted to the subject matter involved as well as the special unilateral wishes of the party offering the technology, See - **Reflections on The Structure of the Modern Law of International Trade**, A Collection of Essays, Edited by Petar Sarcevic, Graham & Trotman/ Martinus Nijhoof, 1990.

495. Private Enterprise and The East African Company , Edited By Aneurin Thomas, Tanzania Publishing House, p. 165.

496. See Table C on Conflict of Interest.

497. In many of the newly independent countries, technology transfer was regarded principally as capital equipment imports and regulated in terms of Balance of Payments considerations, offer of incentives such as profit tax holidays, pioneer status, etc. Thus exchange control legislation formed the basis for screening "foreign investments" with the Central Bank acting as the approval authority, See for Instance Technology Transfer Regulation in Ghana, by Ruth Nyakotey, **In Joint Ventures as a Channel for the Transfer of Technology** United Nations Conference on Trade and Development, UNCTAD Doc. ITP/TEC/9, Moscow, 1988, New York 1990, at p.57; and for an example of the kind of legislative approach applied in such countries, see **Nigerian Industrial Development (Income Tax Relief) Act** 1958, Amended as Decree No. 22 of 1971; Investment Laws and Regulations in Africa, United

Nations, Legal frame work for economic development, especially sections 69 - 70, on guarantees of Foreign Investment.

498. World Investment Report, 1991, The Triad In Foreign Investment, United Nations, New York 1991, UNCTC, ST/CTC/118, p.76; United Nations Centre on Transnational Corporations, Environmental Aspects of Transnational Corporations, A Survey, New York, 1985.

499. For a modern example of a turnkey contract which has been the subject of International Arbitration, See Klockner et al V United Republic of Cameroon and Societe Camerounaise des Engrais (SOCAME) S.A (Case ARB/81/2) award of October 1983, Published in Journal du Droit International, 1984, p. 409.

500. Industrial Co-operation Through the Southern Africa n Development Co-ordination Conference (SADCC) UNIDO/IS.570, 1985, at p.90.

501. See Private Enterprise and The East African Co ., Edited by Aneurin Thomas, Tanzania Publishing House Ltd. 1969; The oldest Development Co-operation in Africa, The Uganda Development Co-operation, initially highly successful, was established in 1952.

502. See note 503, infra.

503. For example, See **Portuguese Foreign Investment Institute, Decree Laws** 239/76 and 348/77 and regulatory Decree 53/77, Articles 5 -7.

504. Situations which have been regarded as justifying special treatment by developing countries include :

(i) Introduction of advanced technology not available in the recipient state;

(ii) Opportunity to train specialised local personnel;

(iii) Manufacture of products using suppliers state of the art technology and producing products very dissimilar to those available locally;

Critical technological investments exceeding locally available resources;

For example, See Foreign Investment and The Development Process, The Case of Greece , by George A. Petrochilos, Avebury, 1989, at pp.58 -60.

505. In the Case of Anaconda V Opic, the ability of the Transnational Corporations to maintain control of host country socio- economic activity was discussed. It was held, inter alia, that even though the transnational corporation, Anaconda, had been stripped of part of its equity and made a minority shareholder in its subsidiary, it still retained effective control - Anaconda Co. and Chile Copper Co . V OPIC, American Arbitration Association, ILM (14) 1975, pp. 1237 -1238.

506. Multinational Investment In Developing Countries by Thomas Anderson, Routledge 1991, at pp. 7 -11.

507. Technology Transfer activity by Transnational Corporations has often been said to resemble the insertion of a key into a lock, but with the opposite profile of the one.

need to open it, thus obliging the recipient to change the lock in order to acquire any benefit - Development, Environment and Technology : Towards a Technology For Self Reliance, by John Galtung, UNCTAD DOC/TD/B/C.6/23/Rev.1, Geneva, 1979, at p. 19, world Investment Report, opcit. pp. 76 - 77.

508. See, among others, The Multinational Corporation and Monopoly of Patents in Nigeria, by Owe Adikibi, in **World Development**, Volume 16, No.4, at p. 512; Transfer of Technology to Nigeria and the Patents and Designs Act 1970, S K Date Bah, Journal of African Law, Volume 25, No. 2, 1981;**World Intellectual Property Report**, Volume 5, No. 9, p.231 etc. Thus for example, Gambia's Trade Mark Legislation, modeled on pre- 1938, British Acts.

509. See, Bilateral Investment Treaties, United Nations Conference On Transnational Corporations, UNCTC/ST/CTC/65, especially preface and Sections 346 - 352; The proto type bilateral investment treaty's major objectives are normally to:

> (i) Provide guarantees to foreign investors with a view to stimulating traditional foreign investment flows;
>
> (ii) Extend Most favored Nation or National Treatment to foreign investors, especially in certain sectors;
>
> (iii) Permit repatriation of profits and returns;
>
> (iv) Lay down conditions governing expropriation or exercise of eminent domain powers by the host State.
>
> (v) Prescribe methods of dispute settlement;
>
> (vi) discourage 'performance requirements';

See Bilateral Investment Treaties; A Comparative Analysis , by Istavan Pogany, In International Business Law, Edited by David L. Perrott, Avebury, 1988 at p. 155; The United States Egypt Bilateral Investment Treaty, A Proto - type for Future Negotiation, Cornell International Law Journal, Volume 16, 1983, p.305.

510. See Chapter 1 of Current Work.

511. For example See - National Legislation, Regulations and Supplementary Documents on Marine Scientific Research in Areas Under National Jurisdiction, United Nations, New York, 1989, Sales, No.E.89.V.9.

512. See For Example See - The Domestic Application of International Human Rights Norms, Judicial Colloquium, February 1988, Common Wealth Secretariat; Legal Problems of International Organisations by Felice Morgenstein, p. 4 - 20.

513. The problem of re-assessing the relationship between states has received theoretical attention for some time now. Sovereignty, is understood to be the whole body of rights and attributes which a state possesses in its territory, to the exclusion of all other states, and also in its relation with other states. Sovereignty confers rights upon states [that is sovereign authority] and imposes on them [that is sovereign co-operation] duties, all of which should evolve to fit new conditions of social life.

Sovereignty can no longer be regarded as an absolute and individual right of every state, as used to be done under the old law founded on individualist regime [that is sovereign authority]. Today, owing to social interdependence and to the predominance of the general interests, the states are bound by many rules which have not been ordered by their will [that is sovereign co-operation]. Judge Wellington Koo : in Barcelona Traction Light and Power Co. Ltd , Preliminary Objections, JUDGMENT ICJ 1964 Preliminary Objections, Judgment, ICJ Reports 1964, pp.62 - 63 noted, inter alia, that International Law, being primarily based upon the general principles of law and justice, is unfettered by technicalities and formalistic considerations which are often given importance in municipal law. *It is the reality which counts more than the appearance. It is the equitable interest which matters rather than the legal interest. In other words it is the substance which carried weight in the international plane rather the form.* However, respect for and preservation of sovereign authority is inherent in the optional clause of the Statute of the International Court of Justice - that is Article 36 (2).

514. For discussion a discussion See Contemporary Problems of International Law - Essays in Honour of Georg Schwarzenberger, Edited by Bin Cheng and E.D Brown, London, 1988.

515. Various theoretical attempt to link General Assembly resolutions to Article 38 are made in the following ways:

> (i) By assuming the expression of consent or acceptance through recommendations as constituting a modern extension of the law of treaties;
> (ii) regarding General Assembly Resolutions as an authoritative or authentic interpretation or concretisation of the provisions of the Charter;
> (iii) By linking General Assembly Resolutions to one of the elements of customary international law, equating resolutions with an expression with an expression of *opinio juris* which results in the formation of customary law;
> (iv) Regarding resolutions as part of the general principles law recognised by civilised nations;

See The Charter of The United and Nations the Development of Fundamental Principles of International Law , by R.St. MacDonald, in Contemporary Problems of International Law, p.205.

516. See - J. Brierly, The Law of Nations 5th. Edition, 1955 at p.162;The Effect of United Nations Resolutions on Emerging Legal Norms, 1979, American Society of International Law Proceedings 300 and opposing views, Virally, The Sources of International Law, in Manual of Public International Law 116 (M. Sorenson, Editor) 1968.

517. R. Higgins, The Development of International Law Through the Political Organs of The United Nations , 1963, at p.5

518. See Chapter 1 of Current Work.

519. R. St. MacDonald, in Contemporary Problems of International Law , at p. 206, also see General Assembly Resolution 95(1) of 11 December 1961.

Affirmation of the Principles of International Law Recognised by the Charter and Judgment of the Nuremberg Tribunal, **United Nations Year Book** 1946 - 47, at p.254.

520. See for instance, United nations Conference on Trade and Development (UNCTAD), Compilation of Legal Materials Dealing with Transfer and Development of Technology, UNCTAD Secretariat, TD/B/C.6/81; UNCTAD Restructuring the Legal Environment, International Transfer of Technology Common to Laws and Regulations on the Transfer and Acquisition of Technology, UNCTAD, Secretariat TD/B/C.6/91, 1982; United Nations Industrial Development Organisation (UNIDO) Guidelines for Evaluation of Transfer of Technology Agreement; Development and Transfer Technology Series, No.12, N.Y 1979; World Intellectual Property Organisation, Licensing Guide for Developing Countries, Geneva, 1977, Draft Joint Inventive Activity Guide, prepared for the Committee of experts on Joint Venture Activity, Geneva 2 - 6 (May) No. JIA/II/2, etc.

521. For example of recent "liberalising" national legislation which brings Direct Regulation statutes in line with minimum international standards in Latin American, see inter alia, Developing Strategic Partnerships and Joint Ventures in Latin America by Anthony Carty, Manchester University 1991; and globally - Policies, Laws and Regulations on Transfer, Application and Development of Technology, opcit. Among countries which passed new mixed jurisdiction laws are - Kenya, Law On Industrial Property, Gazette Supplement No.95 of 15 December 1989; Egypt, New Investment Law No. 230 (1989) reproduced in ICSICD review, Foreign Investment Law Journal, Volume 4, Number 2 Fall 1989; Zambia Investment Act, No. 5 of April 1986; Tanzania Patents Act of 1987; China, Rules for implementation and regulations on the Administration of Technology Import Contracts, reproduced in the European Intellectual Property law review, 1988, p. 248; The Phillipines, Executive Order No. 226 of July 1987, on the Omnibus Investments Code of 1987 & Department of Trade and Industry, Bureau of Patents, Trade Marks and Technology Transfer, Department of Administrative Order No.5, series of 1988.

522. See, Landmark UNGAR Resolution 200 (III) of the 4th. of December 1948; Accelerated flow of Capital and Technical Assistance to Developing Countries, GAOR, 16th. Session, Supp. No. 17, December 1961; and for principles of International Technical Co-operation and Assistance, See **Chapter III** of this work.

523. During the run up debate to the passing of Resolution 200 (III) opcit. note 40, the Union of Soviet Socialist Republics (USSR) proposal that assistance or aid should not result in any advantage for the granting state was defeated, on the primary ground that "interest by western [developed] nations would otherwise soon have been reduced to zero - See The Start of International Development Co-operation in The United Nations, 1945 - 1952, Jaap Van Soet, Van Gorcum Assen, 1978 at p.84; Se also United Nations Conference on Trade and Development (UNCTAD) Resolution 143 (VI) DOC.TD/277 and DOC.TD/B/C.6/L.73 under which overrode the idea of de-commercialisation of technology transfer but emphasised giving access to technology without discrimination.

524. See UNCTAD, Committee on Transfer of Technology, Geneva, Item 6 (e) of the provisional agenda, Access By Developing Countries To Technology in The Public Domain, TD/B/C.6/122 at p.4, 1970.

525. New International Economic Order (NIEO), Programme of Action, 6th. Special Session, May 1974.

526. **Charter of Economic Rights and Duties of States** Article 18 - 19 GAR 3281 (XXIX) of 12 December 1974; 29th. Session of the General Assembly, GAR 3281, 29 UN GAOR, Supp. (N0. 31) at 51, UN DOC.A/9631 (1975) 58.

527. Declaration On The Use of Scientific and Technological Progress in The Interests of Peace And For The Benefit of Mankind, GAR 3384 (XXX) of November 1975.

528. Article 1 - Declaration On The Use of Scientific and Technological Progress in The Interests of Peace And For The Benefit of Mankind, Opcit.

529. Article 5 - Declaration On The Use of Scientific and Technological Progress in The Interests of Peace And For The Benefit of Mankind, Opcit.

530. See for instance Article 269(b) of the Law of The Sea Convention, Official Text of The United Nations Convention on The Law of The Sea, opcit, note 480.

531. The Convention, provides for the adoption of laws and regulations by member states. Under Article 208 (3), such laws, regulations and measures shall be no less effective than international rules, standards and recommended practices, see - Official Text of The United Nations Convention on The Law of The Sea, opcit, note 480.

532. Under Article 266 (1), States, directly or through international organisations, are to co-operate in accordance with their capabilities to promote transfer of marine technology on fair and reasonable terms and conditions. Under article 203, preferential treatment for developing countries is to be given in: (i) allocation of appropriate funds and technical assistance; (ii) utilisation of specialised services of international organisations. See Official Text of The United nations Convention on The Law of The Sea, opcit, note 480.

533. Under Paragraph 52 of the Draft United Nations Code on Transnational Corporations (1988 Draft) Transnational Corporations participate in or enhance the development of managerial and technological resources of host countries.

534. United Nations Conference on Trade and Development, Official Records, UNCTAD, TD/B/1077 (Vol.2) Supp. No.1A, 1985.

535. See Chapter 7 of Current Work.

536. See Report of the Second United Nations Conference on Science and Technology for Development, Vienna, 20 - 31, August 1979, UN DOC.A/Conf.81/16, New York, 1979.

537. Conference Report, opcit , note 536, paragraph (e).

538. See, Review of The Multilateral Treaty Making Process, UN Treaty Series (UNTS) ST/LEG/SER.B.21, New York, 1985.

539. Several countries have passed or modified national legislation for the regulation of international technology transfer transactions, E.g. : Argentina, Brazil, Mexico, Spain, Republic of Korea, Yugoslavia (as it was), Ghana, Nigeria, Iraq, United Republic of Tanzania, China, Ethiopia (as it was then), Sudan, Egypt, India, Nepal, The Phillipines, Australia, Democratic Peoples Republic of Korea (DPRK), Japan, Malaysia, Pakistan, Sri- Lanka, Cuba, Peru, Greece, Portugal, France, etc.; see note 521.

540. The Normative content and attributes of municipal systems, in its complexity and capacity, if influenced by external factors, is directly related to the existing socio-economic state under examination, See Murphy C, Some Reflections Upon Theories Concerning the Nature of Law (1970) 70 Col.L.R pp.447 - 463, especially, p.451.

541. For example, France's legislation dealing with copyright and computer programme protection, Los No. No. 85 - 660 *relative aux droits des artistes interprets, des producteurs de phonogrammes et de videogrammes et des enterprises de communication audiovisuelle*, enacted on 3 July 1985, Published in Journal Officiel 4 July, 1986.

542. Brazilian Normative Act No. 015, establishing basic principles and norms for the registration of contracts involving the transfer of technology and related agreements., 11 September 1975, Normative Act No.30 on specialised technical services 19th. January 1979.

543. See for instance Ghana Investment code (Act 437 of 1981); Uganda Investment Act 1991; Tanzania National Investment (Promotion and Protection) Act 1991; Nigeria National Office of Industrial Property Act (enacted as Decree No.70) of 1979, etc. Many of the least developed countries have introduced a comprehensive framework for the negotiation, acquisition (including assessment) and application of technology on their territories. African Countries which possess institutions for Science and Technology, including Ministries are : Cameroon, Congo, Cote d'Ivoire, Ghana, Sudan, Zimbabwe, Kenya, Nigeria, Zambia, Mali, Togo, Ethiopia, Burundi, Sierra Leone, Senegal, Somalia, Gambia and United Republic Of Tanzania - See, UNCTAD, Final review of the United Nations Programme of Action for African Economic Recovery and Development, 1986 - 1990, TD/B/1280/Add.1, 1991 at p.48; United Nations Educational and Scientific Co-operation Organisation (UNESCO), trends in the Development of Science and Technology in Africa, in particular, since CASTAFRICA 1, (SC - 87/CASTAFRICA 11/Ref.1).

544. For examples of Direct Regulation statutes, see Policies Relating to Technology of the Countries of the Andean Pact : Their Foundations , UNCTAD/TD/107 and Corr.1, in Proceedings of the UNCTAD, Third Session, Volume III, Report and Annexes, United Nations Pub. Sales NO. E.73.II.D.4, part 2; Modifying Decisions 291, substituting Decision 220 (30 I.L.M, 1283, 1991) Decision 85, etc. all modifying Decisions 24 (16 (I.L.M 974, July 1988) of the Andean Commission, and formerly strict regulatory laws of Spain, Portugal, Yugoslavia, Republic of Korea, etc. See UNCTAD, Compilation of Laws and Regulations Relating to Technology Transfer , opcit.

545. See Table C.

546. See - The Capital Goods Sector in Developing Countries : The Technology Issues and Policy Options, study by **UNCTAD** Secretariat, United Nations, New York 1985, **UNCTAD/TT/78, at p. 59.** Technological motives automatically exist given a clear gap between the recipients existing technological capability and the technological requirements for the activity in question.

547. See Chapter on Industrial Property Conventions and Commercial Technology Transfer.

548. Infra , note 550.

549. See, Law and Economics, Volume 1, Edited by Jules and Coleman and Jeffrey Lange, Dartmouth, 1992 at pp.187 - 228.

550. See Technology Selection, Acquisition and Negotiation, **UNCTAD**, opcit, note 23.

551. For example, the Declaration on Principles of International Law concerning Friendly relations and Co-operation among states in accordance with the Charter of the United Nations requires, *inter alia*, that "No state may use or encourage the use of economic types of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind".

552. On this issue, see *inter alia*, The Right to Development and Industrialisation of Less Developed Countries : The case of Compensation for Major Industrial Accidents Involving Foreign - Owned Corporations by P .T . Muchlinski, Commonwealth Secretariat London Paper, 1989; India Today March 15, 1989 for analysis of the Supreme Court of India Decision in the Bhopal Disaster case.

553. Preamble to Decision 84, Andean Commission.

554. JWTL 1981 The Andean Pact, A Decade of Control.

555. E.g Patentees whose inventions were subjected to compulsory licences were to be given a hearing by the relevant national office and could file a suit after the exhaustion of the administrative procedures, though exploitation under the compulsory licence or the running of the time periods would not be influenced by the filing of the suit - Article 36, Decision 24, see I.L.M 138, January 1977; See also , Private Investment in Latin America, Renegotiating the Bargain, Joseph . J. Jova, Clint . E . Smith & T. Frank Crigler (1984) - 19 Texas International law Journal 1984, pp 3 - 32; C . Calvo, *Le Droit Internationale Theoretique Et Pratique* (1896).

556. For Decision 291, Substituting Decision 220, See 30 I.L.M 1283 (1991), For Decision 24, see I.L.M 138, January 1977, Decision 220 17 I.L.M 974, July 1988; Article

557. Article 13 (b) and (c) Decision 291, opcit. note 556.

558. Article 15, Decision 291, opcit. note 556.

559. Controlling Cartels under the Rule of Law, by Sir Lyden MacCassey, Grotius Society 1945, Problems of Public and Private International Law, volume 31, Longmans 1946, P.233.

560. Though evidence that agreements between parent and foreign subsidiary companies, especially those involving payments, are often entered into to evade legitimate host country regulations has existed for some time, few OECD countries regulated any aspect of these arrangements, except under a few minor 'impact' based regulations. However, attitudes have changed, especially with regard to taxation, see for instance Controlled Foreign Companies Act. A Guide to the New Legislation, Touche Ross and Co. by Eric Tomsett, 1984 and notes 62 - 63 and text below.

561. Transferring Harzardous Technologies and Substances by Gunther Handl , opcit note 13, at. 102.

562. Examples of international restrictive agreements date back to early periods. Modern famous examples include, the Phoebus Agreement of 1924 which established a permanent Secretariat to administer quotas and standards, arrange joint prosecution of third parties and potential competitors, fix prices and terms of sale etc. and the Lausanne Agreement of 1946 which dealt with the international sale and distribution of copper semi - manufactures, etc.

563. See, however the BAT Case - The European Communities, !987 Cases 142 & 56/84 in which it was held, *inter alia*, that where Transnational Corporations (TNC's) with global operations were involved, their relationships outside the European Community could not be ignored.

564. Guide-lines for Multinational Enterprises of the Organisation for Economic Cooperation and Development (OECD), Guide-lines for International Investments (Brochure No.272, November 1972; OECD Guide-lines for Multinational Enterprises and Labour Relations 1976 - 79, Experiences and Review by Professor Dr. Blanpain, Kluwer 1979.

565. See Part B of OECD Guide-lines for Multinational Enterprises, opcit., note 564.

566. See for instance Guide for Drawing up International Contracts on Consulting Engineering, including some related aspects of Technical Assistance, United Nations, New York, 1983, ECE/Trade, at 145.

567. See for instance, **World Investment Report**, 1991, The Triad in Foreign Direct Investment, opcit., note 498 at p.76.

568. Transfer and Development of Technology in Developing Countries, a Compendium of Policy Issues, United Nations, **UNCTAD**/ITP/TEC/4, 1990.

569. The *Societe Camerounias d'Engrais (SOCAME) and Cellulose du Cameroun* (CELLUCAM), a venture established in Cameroon under agreement with foreign technology suppliers, had to close down after failure of implementation due to poor contract negotiation - see note 578, infra, (**UNCTAD**).

570. Industrial Co-operation Through the Southern African Development Co-ordination Conference (SADCC), UNIDO/IS.570, 1985 at p.90.

571. SADCC, opcit. note 570, at pp. 91 -93.

572. See note 568, **UNCTAD**, opcit., at p.37.

573. See for instance Public Joint Ventures in Developing Countries, Organisation, Management and Critical Issues, United Nations, ST/TCD/SER.E/6, 1989; Joint Ventures as a form of International Economic Co-operation, UNCTC/ST/CTC/93, New York 1988.

574. Act Number 10 of 1990, Published in the United Republic of Tanzania, Acts Supplement to the Official Gazette, Volume 71, No. 26 of June 29, 1990 at 89.

575. See note 569, opcit..

576. Technology Licensing in East Africa, a Critical Exposition and Analysis, by Belay Seyoum, Avebury 1990 at p.201 and pp. 202 - 203.

577. Arrangements Between Joint Venture Partners in Developing Countries, United Nations, New York, 1987, ST/CTC/SER. B/2, at pp. 24 - 25.

578. See Klockner et al V *United Republic of Cameroun and Societe Camerounaise des Engrais* (SOCAME) S. A (Case ARB/81/2) (Award October 21st. 1983, reversed), opcit. note 499.

579. Technology Selection, Acquisition and Negotiation, **UNCTAD**, ITP/TEC/22, at Section 42.

580. See - Joint Ventures as a Channel for the Transfer of Technology, Moscow 1988, UN 1990, **UNCTAD** /ITP/TEC/9 at p 111 - 113; Oserhiemen. A. Onsubor, Law and Policy on the Registration of the Transfer of Technology Transactions in Nigeria, 21 J.W.T.L, 13 at pp 21 & 22.

581. See Table C.

582. For an illustration of general terms and conditions contained in the potentially most equitable form of international technology transfer that is, the Joint Venture, See Chapter V of current work.

583. Restructuring the Legal Environment: International Transfer of Technology; common approaches to laws and regulations on the transfer and acquisition of technology; United Nations Conference on Trade and Development, Trade and Development Board Document - TD/B/C.6/91, October 1982.

584. For discussion of the position of the least developed countries and the special multilateral measures that are a precondition for the successful absorption of imported technology by these countries, see Chapters 3 and 4 of this work.

FOOT NOTES FOR CHAPTER SIX

585. The majority of intellectual property rights granted in developing countries are granted to nationals of developed states - **WIPO**, Industrial Property Statistics 1985, part 1 : Patents Geneva.The protection gaps which the new standards are supposed to fill are practically non - existent in the laws of most developing countries - For a lucid analysis of the Uruguay Round **GATT - WIPO** proposals, See GATT or WIPO, opcit note 24; also - **Legal Issues in the Revision of the International Patent System**, by Constantine Vaitsos, in The Political Economy of Law - a Third World Reader, opcit, note 32.

586. For statistical indications of the scientific and technological gap between developed and developing countries see, *inter alia*, Organisation for Economic Co-operation and Development (OECD) Survey - OECD , Selected Science and Technology Indicators : Recent Results 1979 - 86, Paris September 1986.

587. See, **Copyright Protection for Intellectual Property to Enhance Technology Transfer**, Hearing Before the Sub Committee on Science, Research and Technology, of the Committee on Science, Space and Technology, United States House of Representatives , 101st Congress, Second Session, 1990 (microfiche), **Computer Software and Intellectual Property**, background paper presented at Hearing; also see, Appropriate International Forums, Meeting the Challenges of the World Information Economy, Geza Feketekuty and Jonathan D. Aranson, Advance Technology Alert System (ATAS), Centre for Science and Technology Development, United Nations, New York 1986.

588. Appendix B entitled International Protection for computer Software, Hearing Before the Sub Committee on Science, Research and Technology, of the Committee on Science, Space and Technology, opcit, note 587.

589. See for instance International Law Association Declaration on the Legal Aspects of a New International Economic Order, 1986, Seoul, Sub. No. 11(1).

590. Developed countries carry out the bulk of global research and development, either by subsidising it on a large scale or by actually carrying it out - Foreign Direct Investment and the Development Process, The Case of Greece by George Petrochilos, Avebury 1989 at p.37; Major Issues in Transfer of Technology to Developing Countries, a case study of the Pharmaceutical Industry - **UNCTAD**/TD/B/C.6/4 (1975) at p.35; Unification of Commercial Law Between Societies at Equal and Different Levels of Industrial and Social Development, in the Legal Organisation of Commerce and its Relation to the Social Conditions, Aarhus 1979 at p.29; Technology Trade, Joint Hearings before the Committee on Science and Technology and the Committee on Interstate and Foreign Commerce, United States House of Representatives and the House Task Force on Industrial Innovation, 96th. Congress, June 1980; Technology Transfer Mechanisms in the United Kingdom and Leading Competitor Nations, Innovation Working Party, National Economic Development Council, 1989, p.11 - 17.20

591. For example in Hansard's Parliamentary Debates, 3rd series 1851, Vol.cx viii, 1st July 1851, col. 14. Examples of "traditional arguments" include:

(a) Scientific men are in the habit of speedily making known their inventions to the public without resorting to state protection;

(b) Protection or incentives tend to promote useless inventions since not one in fifty inventions are useful to the public;

(c) Historically, important inventions such printing and gunpowder were not made under incentive but threat

592. See Chapter 6 of present work.

593. **GATT** or **WIPO**, opcit, note 24, especially at p.27; this view is held, among others by Dr. Peter Hunz - Hallestein - see note 594, infra; See also United States Proposals (Revised) for **GATT** proposals for trade related IPR's, **GATT** - Doc.MTN.GNG/NG11/W/ 14 Rev.1 of October 1988 and European Community Proposals, **GATT** - DOC.MTN.GNG/NG11/W/2 and DOC.MTN.GNG/NG11/W/16 of November 1987.

594. See Peter Hunz - Hallestein, The United States Proposal for a GATT Agreement on Intellectual Property and Paris Convention for the Protection of Industrial Property, Vanderbilt Journal of Transnational Law, Vol: 22, 278 - 282.

595. See The Principles of Free and Fair Trading and Intellectual Property Protection in the Legal Framework of a NIEO - In Oppermann and Petersmann (editors), Reforming the International Economic Order, German Legal Comments, Berlin 1987, 81 - 98.

596. Harmonisation efforts have already been undertaken in various **WIPO** Committees, see for instance, **WIPO** International Bureau, Committee of Experts on the **Harmonisation of Certain Provisions in Laws for the Protection of Inventions**, Forth Session, Industrial Property, 1988, at p.179.

597. The World Intellectual Property Organisation was established under the Stockholm Convention of 14th July 1967 and became a United Nations Specialised Agency; Industrial Property, 1967 at p.155.

598. Licensing Agreements in Developing Countries, **UNCTC** (1987) at p.5.

599. **WIPO** Newsletter, August 1988.

600. See, **WIPO** - Doc. INF/29 (September 1988) : Existence, Scope and Form of Generally Internationally Accepted and Applied Standards /Norms for the Protection of Intellectual Property, prepared by the International Bureau of **WIPO**; International Encyclopaedia of Comparative and Law, Vol. Xiv, Copyright and Industrial Property, Chap 1, I - 19

601. **WIPO** - Doc. INF/29, September 1988.

602. Director General's address, International Year of Peace, **WIPO** Newsletter, November 1986.

603. For exclusions from patent protection in relation to *inter alia*, pharmaceutical products and processes, animal and plant varieties, biological processes, food products and processes, computer programs, chemical products, etc. see **WIPO** Document - HL/CE/IV/INF/1 Rev.1, also reproduced as annex II, in GATT or WIPO, opcit note 24

604. For instance, according to the head of the United States Delegation to a **WIPO** committee of experts, in relation to copyright, he was of the view that 'it [was] clearly preferable that the law of the forum state should govern determinations of the authorship of the interpretation or effect of contracts ... if a concluded under law of another country; See Opinion by Ralph Osman, United States Registerer of Copyrights, head of the American delegation to the Committee of Experts (**WIPO**), November 4 - 8, 1991.

605. **GATT** or **WIPO**, opcit, note 24, at p.27; The view of the International Chamber of Commerce (ICC) on the Revision of the Paris Convention centred on opposition to:

(i) grant of exclusive compulsory licenses, either through express or defacto provisions;

(ii) forfeiture of patents for non working after five years (proposed 10); and support for:

(a) introduction of economic rights clauses aimed at protecting non - voluntary licensee.

See - Licensing Agreements in Developing Countries, UNCTC (1987), at p.5.

606. See The Protocol on Provisional Application of the **GATT**, of 30 October 1947, 55 UNTS 308 and subsequent protocols of accession.

607. International Encyclopaedia of Comparative Law, Volume XVII, State and Economy, p.8.

608. For Details, see Jackson, World Trade and the Law of **GATT**, Indianapolis 1969 p.264.

609. **GATT**, Trade Policy Review, The United States of America, 1989, **GATT**, Geneva, March 1990; Trade Policy Review, The European Communities, **GATT**, Geneva 1991, Volume 1.

610. **GATT**, Trade Policy Review, European Community, 1991, **GATT**, Geneva. (for instance, the GSP benefits offered by the European Community countries (EC), are temporary and non - binding. Under a standard formula, the EC offer could be withdrawn later 'thus maintaining the possibility of remedying any unfavourable situations which might arise following the implementation of the system

611. Dunkel - **GATT**/IPR's Draft , Part V, Article 63(1) and 64, in World Intellectual Property Report, Volume 6, 1992, pp. 42 - 45, herein after, Dunkel - **GATT**/IPR's Draft.

612. Appropriate International Forums. Meeting the Challenges of the World Information Economy. Geza Feketekuty and Jonathan D. Aranson, Advance Technology Alert System (ATAS), Centre for Science and Technology Development, United Nations, New York 1986 at p.159.

613. Report of the Intergovernmental Group of Experts on Restrictive Business Practices on its 9th Session, **UNCTAD**, TD/B/1261, April 1990.

614. The **GATT** dispute settlement system constitutes of eight different dispute settlement mechanisms or panels created under the General agreement and under the Tokyo Round Codes. Each panel can only examine the matter before it in light of the agreement under which it was established, but not others - Article XXIII.

615. See, Trade and Tariff Act of 1974 as amended; Omnibus Trade and Competitiveness Act, 1988, Public Law No. 100 - 418, section 301; R. Michael Gadbaw and Timothy J. Richards (Eds) Intellectual Property Rights : Global Consensus, Global Conflict?, Boulder & London, West View Press, 1988, p.6; Robert Benko, Protecting Intellectual Property Rights (Washington D. C, American Enterprise Institute, 1987, p.11.

616. **The World Trading System at Risk**, Jagdish Bhagwati , Harvester 1991 - quoting Finger (1989), pp. 105 -107.

617. **GATT** or **WIPO**, opcit, note 24, at p.33.

618. Appendix B entitled International Protection for computer Software. Hearing Before the Sub Committee on Science, Research and Technology, of the Committee on Science, Space and Technology, opcit, 587, p.88.

619. EEC proposal (**GATT** - Document MTN.GNG/NG11/16 of November 20, 1987 and MGN.GNG/NG11/W/25 of July 1988.

620. See note 587, opcit and accompanying text.

621. World Trade and Development Report, 1987, **UNCTAD**/TDR/7, at p.73.

622. Ministerial Declaration on the Uruguay Round, Declaration of 20 September 1986, herein after Punta Declaration see Basic Instruments and Selected Documents 33rd Supplement, (BISD) **GATT** 1987.

623. Punta Declaration, opcit, note 622.

624. Mid term Review Agreements Adopted by the Trade Negotiations Committee, April 1989.

625. A few developing countries export substantial amounts of technology, especially to other developing countries - See, Technology Exports from Developing Countries: Dimensions, Nature, Potentials and Issues, by Jan Monkiewicz, United Nations Industrial Development Organisation, UNIDO, Publication (Is. 525) 1985.

626. The US Business Software Alliance cited stopping piracy in the Germany as the highest trade priority of the United States software industry, quoting a 'world wide'

cost of $1.98 Billion and $721 Million (only US), incurred due to software piracy in Germany alone - See Intellectual Property **Newsletter Monitor Press**, Vol. 15, Number 5, May 1992 at p.8, also, **GATT** Doc. 45382 on the subject of anti counterfeiting measures.

627. **GATT**, Trade Policy Review, The United States of America, 1989, **GATT**, Geneva, March 1990; Trade Policy Review, The European Communities, **GATT**, Geneva 1991, Volume 1.

628. See Chapter 2 of current work.

629. Industrial Innovation and Patent and Copyright Law Amendments, Hearings, House Committee on the Judiciary 96th Congress, Second Session, Washington 1981, p. 88. In the **Computer Software & Intellectual Property, Background Paper** (opcit), note 587, it was noted that the areas of new intellectual property are areas of strength for developed countries and protection of such areas would protect investments in the sector and increase benefits from such investments through trade, p.28 of Report.

630. The Draft Agreement or IPR "Final Act" of the Uruguay Round, opcit note 611, has meet with dissatisfaction from all parties, especially the developing countries which have to 'accept' the measures as part of the entire package, in accordance with **GATT** rules which *require acceptance or rejection of the entire negotiated package as a whole*. Developing countries have therefore sought to adopt the measures under **WIPO**.

631. **GATT** or **WIPO** - opcit, note 24; Dunkel **GATT** - IPR's Draft, infra; See for instance European Community proposal under the Uruguay Round, EEC proposal (**GATT** - Document MTN.GNG/NG11/16 of November 20, 1987 and MGN. GNG/ NG11/ W/ 25 of July 1988 and World Intellectual Property Report, Vol., 2 1988, United States Proposal for Negotiations on Trade Related Aspects of Intellectual Property Rights, 34 Pat. TM and Copyright Journal, BNA 667 (1987), etc.

632. **GATT**, Trade Policy Review, The United States of America, 1989, **GATT**, Geneva, March 1990; Trade Policy Review, The European Communities, **GATT**, Geneva 1991, Volume 1.

633. Industrial Innovation and Patent and Copyright Law Amendments, Hearings, House Committee on the Judiciary 96th Congress, Second Session, Washington 1981 p.794.

634. **Industrial Innovation**, Hearings, opcit, note 629, Appendix 1 at Section 3, p.800.

635. **Industrial Innovation**, Hearings, opcit, note 629, Appendix 1, at Section 3; also see Computer Software and Intellectual Property, United States Hearing on Copyright Protection and Technology Transfer, opcit, note 587.

636. For an exhaustive account of the issues raised by the United States accession to Berne, see Berne Convention Implementation Act of 1987, Hearings Before the subcommittee on Courts, Civil Liberties and the Administration of Justice, of the Committee of the Judiciary, House of Representatives, 100th Congress, 1987 (micro fiche).

637. See testimony of Allen Wallis, Berne Convention Hearings, opcit, note 636.

638. See Representative of United States Department of Commerce testimony, Berne Convention Hearings, opcit, note 636.

639. **GATT** - Doc.MTN.GNG/GNG/NG11/W/16 of 20 November 1987, **GATT** or **WIPO**, opcit, note 24, at pp. 27 - 29.

640. See for instance, Second Session of the Diplomatic Conference on the Revision of the Paris Convention, **WIPO** Doc. PR/SM/6, 1981, Speech by Representative of Spain, especially page 36.

641. EEC proposal, **GATT** - Document MTN.GNG/NG11/16 of November 20, 1987, introduction.

642. Developed country intellectual property national systems recognise the potential of abuse in all granted IP rights, for example, under the patent misuse and exhaustion doctrines and antitrust systems. However, the potential for abuse is regarded as minimal, given a free market and adequate protection of rights - See, The Patent - Antitrust Intersection: A Reappraisal, 97 Harvard L.Review 1813 (1984)

643. *Public privatisation* occurs where public sector research institutes and research and development support agencies, reserve patent and other rights to themselves. This phenomenon occurs due to the increased use of state support systems (subsidies) for research and development, especially in the leading industrial nations, and has created situations where public sector research institutes and research and development support agencies, reserve patent and other rights to themselves;

644. The United States Federal Transfer of Technology Act, 15 U.S.C, S .3710 (1988), provides an example of such a link between state and enterprise aimed at maximisation of privatisation of technology rights through transfer from the public to the private domain.

645. See the United States - proposals - **GATT**, Doc.MTN.GNG/NG11/W/14, Reprinted in 34 PTCJ 667 of October 29, 1987 (December) Patents and Licensing 11, Revised text MTN.GNG/NG11/W14/Rev. 1 of 17 October 1988, also reproduced in International Computer Law Advisor, June 1989, p.13. Japanese proposal is summarised in 1987 (December) Patents and Licensing 14, MTN.GNG/NG11/W17/Add.1 of 23 September 1988; EEC proposal (**GATT** - Document MTN.GNG/NG11/16 of November 19, 1987 and MGN.GNG/NG11/W/25 of July 1988.

646. **GATT** FOCUS News Letter, Nov. 1989.

647. United States - proposals - **GATT**, Doc.MTN.GNG/NG11/W/14, opcit. note 645, for example, with regard to compulsory licensing of copyrighted works, such licensing would have to take into account, *inter alia*, the willingness of the copyright owner to correct said abuse(s), be limited to works and uses permitted under the Berne Convention (1971), preserve the **material interests** (vis a vis moral rights) of authors and copyright owners, be accompanied by detailed laws and regulations

providing strong safeguards, ensure prompt payment and remittance of royalties consistent with those negotiated on a voluntary basis etc.

648. See the United States - proposals - **GATT**, Doc.MTN.GNG/NG11/W/14, Reprinted in 34 PTCJ 667 of October 29, 1987 (December) Patents and Licensing 11, objectives.

649. See Copyright Hearings, opcit note 587, especially at p.74. Though the reason most commonly cited is that protection for software would give commercial software developers adequate market incentives to invest adequate time and resources, the real underlying in seeking international protection for software is the maintenance of competitive advantages in the global market place, through protection of so called lead times for enterprises which first complete innovative programs or software.

650. Copyright Hearings, opcit note 587, Testimony of Dr. James W. Curlin.

651. United States - proposals - **GATT**, Doc.MTN.GNG/NG11/W/14 Rev.1, article 5.

652. United States - proposals - **GATT**, Doc.MTN.GNG/NG11/W/14, Rev.1 article 6.

653. But in the context of trade secrets, governmental purposes are defined to mean 'compelling circumstances involving major national emergencies posing an imminent unreasonable risk to health or the environment, or to facilitate health and safety registrations')As defined in case of Trade Secrets, United States - proposals - **GATT**, Doc.MTN.GNG/NG11/W/14, Rev.1 article D (6)

654. See chapter Two of present work for details.

655. Historically, all developed countries have resorted to the right of compulsory licensing. See, United States compulsory licensing provisions - Public Performance of Musical Works on Jukeboxes, Copyright Act of 1976, as amended, section 116 - 17 USC (1982) (U. S), Plant and Variety protection Act 1970 USC 2321, U. S Patent Act, 1952, 35 USC Section 1-293 (1970), the Atomic Energy Act, 42 USC, sections 2011 (1970) etc., French Patent law of 1884 which required exploitation within two years, subject to cancellation or revocation on failure to exploit, Italian Law of 1939 which required working in proportion (grossly disproportionate work being regarded as insufficient to maintain the right, extra - See Restrictive Business Practices, Analysis of Governmental Measures Relating to Restrictive Business Practices, Economic and Social Council (ECOSOC), United Nations, Official Records, 16th Session, Supp. No.11A, New York.

656. US Semiconductor Chip Protection Act, see Copyright Hearings, opcit note 587, Article on Computer Software and Intellectual Property. The integrated circuits proposal seeks to acquire protection for original layout - design, incorporated in a semiconductor chip, for a term of at least ten years from the date of first commercial exploitation and date of registration.

657. For example, Brazil, India, South Korea etc. see **GATT** or **WIPO**, opcit, note 24, pp.149 - 156.

658. United States - proposals - **GATT**, Doc.MTN.GNG/NG11/W/14, Rev.1- Objectives.

659. The suggested solution under the Dunkel, **GATT** - IPR's Draft, (opcit) Article 8, is inadequate to enable developing countries to apply 'non - voluntary' measures unless such measures are deemed acceptable to developed countries.

660. According to **UNCTAD**, the current IPR's reform drive, will, like the earlier market disruption provisions, provide developed countries with a valuable tool to be wielded against those developing countries which do not rely on governmental intervention in technological innovation and development any more than industrialised countries but achieve a greater ability to offer on the international market, competitive lower priced goods or services, See **Trade and development Report, UNCTAD/TDR/4**, at sections 66 - 67.

661. **GATT**. Doc. MTN. NG11/W/30, of 31 October 1988, section 18.

662. Various options have been suggested by developed countries for the incorporation of IPR's into the **GATT** framework that is:

(a) Through amendment of **GATT** Articles;

(b) Implementation of the draft Counterfeit and Piracy Code;

(c) A new **GATT** Code, outside the existing product **GATT**, open to **GATT** signatories and others, and designed to 'promote effective and adequate protection of IPR's' in order to 'reduce distortions and impediments to international trade' - current round approach;

(d) Inclusion of IPR's into a Service **GATT** or Service Constitution ;
GATT or WIPO, opcit, note 24, pp. 105 - 109, especially page 107.

663. Brazilian proposal, **GATT**. Doc. MTN. NG11/W/30, of 31 October 1988 , section 12.

664. See Chapter 2 in present work (on the International Intellectual Property Regime and Commercial technology Transfer).

665. International Encyclopaedia of Comparative Law , Volume XIV, Copyright and Industrial Property, Chapter 1, General Questions, The International Conventions, Eugen and Ulmer, at p.5.

666. Technology Selection, Acquisition and Negotiation, opcit , note 23 at p.99.

667. Ministerial Declaration on the Uruguay Round, Declaration of 20 September 1986 , see Basic Instruments and Selected Documents 33rd Supplement, (BISD) **GATT** 1987, pp.19ff; For analysis, see for instance, The New GATT Round of Multilateral Trade Negotiations, Legal and Economic Problems, Edited by Ernst - Ulrich Petersmann and Meinhard Hilf, Kluwer, 1991, Declaration reproduced from p.581, and also **GATT** or **WIPO**, opcit, note 24.

668. See Preamble Draft Agreement (Dunkel - **GATT**/IPR,s), of the 20 th. December 1991.

669. See Hart, **The Mercantalist's Lament : National Treatment and Modern Trade Negotiations**, note, 682, infra .

670. For unilateral actions based on this premise, see especially actions under Section 301 of the United States Omnibus Trade and Competitiveness Act of 1988, Public Law No. 100 -418 amending the Trade Act; and potentially, the European Community New Commercial Policy Instrument 1984, Regulation No. 2641/84; Examples of conditional MFN which similarly will in effect be extended to IPR's, include the Multifibre Arrangement (MFA) 1974 as subsequently renewed, Sectoral Arrangements (for example, steel), Subsidies etc. See - World Trade and Development Report (1984), **UNCTAD**/TDR/4 (volume II); United States Congress, Improving Enforcement of Trade Agreements : Hearing Before the Committee on Finance, United States Senate, 100th Congress, 1st session, march 1987; Pursuing United States Goals Bilaterally : Intellectual Property & Special 301, Business America, Volume 110, No. 19, September 25 1989, p.6.

671. Dunkel - **GATT**/IPR,s Draft), (opcit) Article 3 (1).

672. Article 4, Dunkel - **GATT**/IPR,s Draft (opcit). The exceptions - Article 4 of the Draft - to this requirement are:

> (a) Article 4(a) those deriving from international agreements on judicial assistance and law enforcement of a general nature and not particularly confined to the protection of IPR's,
>
> (b) Those exemptions made under the Berne (1971) or Rome Conventions authorising that the treatment accorded be a function of not of national treatment but of the treatment accorded in another country,
>
> (c) In respect of the rights of performers , producers of phonograms and broadcasters not provided for under the **GATT** agreement,
>
> (d) Existing rights (at the time of the agreement) deriving from international agreements relating to the protection of intellectual property, provided that such agreements are notified to the Council on Trade Related Aspects of IPR's and do not constitute an arbitrary or unjustifiable discrimination against nationals of other parties.

673. In International Trade and Global Development, Essays in Honour of Jagdish Bhagwati, Edited by Koekkoek and L.B.M Mennes, at p.124.

674. **GATT** Article XIX.

675. **GATT** Articles VI and XVI.

676. Dunkel - **GATT**/IPR's Draft, (opcit) Article 8 (1), pp. 42 - 45.

677. Dunkel - **GATT**/IPR's Draft, (opcit) Articles 9 - 14.

678. Article 13 (copyrights), Article 17 (Trade Marks) , Articles 30 and 31 (Patents), etc. of the Dunkel - **GATT**/IPR's Draft (opcit).

679. For exclusions from patent protection in relation to *inter alia*, pharmaceutical products and processes, animal and plant varieties, biological processes, food products and processes, computer programs, chemical products, etc. see **WIPO** Document **HL/CE/IV/INF/1** Rev.1, also reproduced as annex II, in GATT or WIPO. New Ways in the International Protection of Intellectual Property, opcit, note 24.

680. Despite the low level of grants to nationals, in the majority of developing countries, especially the least developed, the exclusion of alternative innovation promoting intellectual property instruments, such as 'utility patent' grants (for low level, low cost technological inventions of local or regional interest, developing countries have not included on the negotiating Agenda of either the Uruguay Round or the Paris Convention Revisions, such alternative mechanisms - For a discussion of the value of utility patent grants, see Ullrich, **The Importance of Industrial Property Law and other legal Measures in the promotion of Technological Innovation,** Industrial Property, 1989 at p.102; Utility Models : the Experience of the Federal Republic of Germany, Industrial Property, 1987, Hausser, p.314 . Many countries grant utility patents in various forms, the most famous being Federal Republic of Germany and Japan - See **Industrial Property Laws and Treaties,** Multilateral Treaties, 1-008.

681. Various bilateral and unilateral 'pressure measures' have forced developing countries to seek canalisation of such pressures into a multilateral framework.For example United States pressure actions against specific developing countries under Section 301 of its Omnibus Trade Act of 1988, is well known, see for instance, action against Argentina 36 PTCJ 406 (8-18-18), Brazil 36 PTCJ 745 (10-27-88) etc.

682. Hart, The Mercantalist's Lament : National Treatment and Modern Trade Negotiations 21 (6) J.W.T.L 39 & 59 (1987); M.Wolf, Fiddling While the GATT Burns, The World Economy, 1986, 9 (1), 1 - 8; and for an alternative view, J . Culbertson, The Folly of Free Trade, Harvard Business Review 1986, 64 (5), pp. 122 - 128.

683. In a 1974 Organisation for Economic Co-operation and Development (OECD) Council report, the Council identified barriers to legitimate trade that could result from abuse of IPR's as including:

(a) Territorial, quantity or price restrictions imposed by patent pools or cross licensing arrangements;

(b) Export prohibition of patented products or restrictions of such exports to specified areas established by licensing agreements;

(c) Clauses concerning tied sales, obliging the licensee to obtain goods form the licensor or his designated sources when the tied sales were not justified by technical reasons concerning the quality of the goods manufactured under the licence;

(d) Clauses preventing parties to the patent licensing pool from competing with other parties to the contract or with third parties;

(e) Fixing of prices of patented products by means of patent licences, etc.

(f) Due to the increase in the information content of transferred technology, it is likely that such restrictive practices can only increase.

See - **Technology, Trade Policy and the Uruguay Round**, opcit note 23, at p.251.

684. See, *inter alia*, **Developing Countries and Trade Related Aspects of Intellectual Property Rights**, by Abdulqawi. A . Yusuf, in Technology Selection. Acquisition and Negotiation, **UNCTAD**, ITP/TEC/22, at 97 -100;

685. Under **GATT**, subsidies have traditionally been defined to include any form of price support, which operates directly or indirectly to increase exports of any product .. or to reduce imports of any product, Article XVI (I) **GATT**, Basic Instruments and Selected Documents (BISD), 1961, 185 ss. The development of new technologies, which are increasingly regarded as central to socio - economic development, is to a large extent publicly subsidised, especially in the industrialised countries - International Encyclopedia of Comparative Law: Volume XVII, State and Economy, especially at P.56.

686. The Preamble to the Agreement of Subsidies and Countervailing Measures, recognises that:

(i) Subsidies are used by governments to promote important economic objectives,

(ii) May have harmful effects on trade and production,

(iii) Emphasis should be on effect of subsidies;

See- Edward M. Graham, **World Trade Law and Government Subsidies to Industrial Innovation**, in **Technology and International Relations**, Edited by Hieronymi, McMillan, 1987, pp. 27 - 36.

687. Phrase popularised by the United States in its international trade practice and policy. Under this concept, (which does not primarily address material inequalities) all countries trading with the United States are expected to maintain:

(a) Open, equitable, and reciprocal market access,

(b) Reduce or eliminate barriers and other trade distorting policies and practices,

(c) Maintain more effective systems of international trade disciplines and procedures.

See - **United States Trade Act of 1974, Section 301**; **United States Omnibus Trade and Competitiveness Act** of 1988. By transferring the authority of determination, decision making and implementation under Title III (ss. 301 - 309) of the Trade Act of 1974 as amended from the President to the United States Trade Representative (**USTR**), the policy of unilateral pressure became institutionalised as a permanent active policy trade measure of the United States.

688. Edward . M. Graham, opcit, note 686, at p.34 and Reflections on Technology, International Order and Economic Growth, by Otto Hieronymi, at p. 93 - 94; Member states of the Africa Regional Intellectual Property Organisation (ARIPO), most of which still run 'dependent' national intellectual systems based on former governing metropolitan states models, have suspended decision on whether to grant utility patents on the grounds that they want to reward 'inventors' rather than simple

'utility modellers', See **GATT** or **WIPO**, opcit, note 24, at pp. 153 - 157; 6 **WIPR** 231, No.1, 1992 and 5 **WIPR**, No.9, 1991. According to Hieronymi, the issue of the introduction and control over technology policies is even more complex than that of trade liberalisation, since governments tend to advocate free trade in areas where their nationals have strong market positions or even monopoly power while favouring technological policies or other exceptional measures in areas of national weakness.

689. See, Article II lit.d of the Subsidies Code, amended in 1979, **GATT**, Basic Selected Instruments and Documents, No.26 (1978 - 79), Geneva 1980.

690. Unfair because the relevant subsidised technology would protect the profitability of the home countries subsidised activity rather than individual rights; Trade sanctions include compensatory and retaliatory withdrawal of trade concessions, (including product or country graduation from preferential treatment under for instance a developed country Generalised system of preferences) imposition of tariffs and quotas etc.

691. See, **Bilateral Agreements on Trade and Economic Co-operation, Concluded by Developing Countries,** by Alfredo Castillo - Gomez, **UNCTAD**/ST/ECDC/36, Vol.II, 1988, at p.248, especially pp. 247 - 257.

692. Even after its revision in 1955, the General Agreement contained *superficial* provisions relating to trade problems of developing countries and these were mainly to be found under Article XVIII (infant industry protection measures and Balance of Payments provisions), Article XX lit (l) (measures undertaken in pursuance of commodity agreements), Article XXVI (5) lit (c) (concessional terms of accession for former dependencies), Article XXVIII bis para.3 lit (b) (more flexible use of tariffs by developing countries to promote their economic development) - See International Encyclopaedia of Comparative Law, Volume XVII, State and Economy . Part of IV of **GATT**, entered into force in June 1966 applied from 1965. Initially implemented through waivers of 25th May and 26th November 1971, under Article XXV (5), it is now implemented under the enabling clause.

693. See **UNCTAD** Doc.TD/B/979, on improvement of the **GATT** safeguard system.

694. Thus for example, while Article XXXVII imposes an obligation to refrain from the introduction of new customs duties, quantitative restrictions and consumer taxes on developing countries exports and the obligation to liberalise existing barriers of this nature, such obligations apply only 'to the fullest extent possible, except when compelling reasons, which may include legal reasons, make it impossible to give them effect. See for instance - Deepak Nayyar, Towards a Possible Multilateral Framework for Trade in Services : Some Issues and Concepts, In **Technology, Trade Policy and the Uruguay Round**, opcit note 23, Papers and Proceedings of a Round Table, at Delphi, Greece, **UNCTAD**/ITP/23, United Nations, New York , 1990, at p.133.

695. **GATT** BISD 1969 supp. pp. 93 - 94; **The Uruguay Round and Beyond,** the First Report from the Ford Foundation supported project on developing countries and the global trading system, edited by John Whalley, McMillan 1989, pp. 111 - 116.

696. See, Trade and Technology : Issues at Stake for Developing Countries by Ruben Ricupero , in **Technology, Trade Policy and the Uruguay Round**, opcit, note 23, at p.193.

697. See Dunkel - **GATT/IPR's Draft**, (opcit), Article 65; Under the draft transitional arrangements provision is made for:

(a) Lapse of one year before parties are obliged to apply provisions of the agreement - Articles 65;

(b) Non application agreement by any developing country for four {4} years, except in relation to provision of National Treatment, Most Favoured Nation Treatment and compliance with **WIPO** concluded multilateral Convention obligations. Same period applies to centrally planned economies in transition to market free - enterprise economies;

(c) Non application of the agreement's provisions on sector and product exclusions for a five year period by a country possessing, at the date of application of the agreement, laws allowing such sector or area exclusions. Under Article 66, special provisions are made in favour of the *least developed countries that is:* Ten year transitional period for the least developed countries , (extendable by the **GATT** Council on IP), during which these countries would not be required to implement the agreements provisions. Developed countries would also provide incentives to enterprises and institutions in their territories for the purpose of promoting technology transfer to the least developed countries. These free enterprise and market based provisions are a token recognition of the technological non-competitiveness of the least developed countries and developed countries belief that private parties are best suited to transfer technology to this group of countries.

698. Dunkel - **GATT/IPR's Draft**, opcit.

699. **WIPR**, Vol.6, No.2, February 1992.

700. **The New GATT Round of Multilateral Trade Negotiations, Legal and Economic Problems**, edited by Ernst - Ulrich Petersman & Meinhard Hilf, Kluwer, 1991, especially 572 - 573.

701. For a Socio - economic evaluation of the new role of information technology in technology transfer, see - **Information Technology and International Relations: Perspectives for South and North**, by Cees . J. Hamelink, in Information Technology and the New International Economic Order, by Jorg Becker, 1984 at p.41 -.

702. For example, as under Dunkel - **GATT/IPR's Draft**, opcit, Article 8.

703. See for instance, Brazilian Proposal, Multilateral Trade Negotiations, The Uruguay Round, MTN.GNG/NG11/W/30, October 1988.

704. Dunkel - **GATT/IPR's Draft**, (opcit) Section 5, Article 27.

FOOT NOTES FOR CHAPTER SEVEN

705. Code refers to Draft international Code of conduct on the Transfer of technology, TD/Code TOT/52, 1988 or the draft Code TD/Code/TOT/47, as stated; See also Reports of the Secretary General of **UNCTAD** on the Consultations held in 1986 - TD/CODE TOT/50 and 1987 in TD/CODE TOT/51, respectively.

706. **International Legislation, a Collection of the Texts of Multi-partite Instruments of General International Law.** Edited by Manley O Hudson, Vol.1919-21, Washington Carnegie Endowment for International Peace 1931 (**Introduction**).

707. UNCTAD VIII, Analytical Report by the UNCTAD Secretariat to the Conference TD/358, 1992; also see Chapter 5 of this current work for a discussion of the impact of international Decisions, Resolutions, Declarations and Agreements relating to international technology transfer on regulation of international technology flows, and Chapter 1 for a discussion of the so called hard and soft law issues.

708. UNCTAD VIII, Analytical Report by the UNCTAD Secretariat to the Conference, opcit, at . ss. 610 - 624.

709. UNCTAD VIII, Analytical Report by the UNCTAD Secretariat to the Conference, opcit, at s. 614.

710. See - Chapter 5 of this current work.

711. For socio - economic arguments supporting technology recipients - See, *inter alia*, Farouk. J. Contractor; International Technology Licensing Compensation Costs and Negotiation, Lexington Books C - 1981 - at p.106; Towards a theory of Technology Licensing, Stanford Law review,Volume. 1989; The Multinational corporation and Monopoly Patents in Nigeria, World Development Journal, Vol.16, No.4, (Pergamon Press); United Nations centre on Transnational Corporations,Transnational Corporations in World Development,1988 at p.183 - It is alleged, *inter alia*, that Transnational Corporations in particular, transfer to LDC's technology which is too sophisticated or inappropriate largely because they control the patent systems in LDC's and possess the know-how which keeps the recipient dependent on the supplier. For opposing views, e.g that LDC's lack the necessary infrastructure such communications networks, local amenities and physical and government support which would attract high-tech firms or ensure the necessary adaptation and diffusion of such technology if supplied- see, Blakely E. J, Roberts B. H and Manidis; (1987) **Principles of designing support systems for the formation and attraction of advanced technology firms, International Journal of Technology and Management**, Vol.2, No. 3&4 pp. 337-356.

712. For a discussion of the material conditions which necessitate the need for a Code, see, *inter alia*, - Legal aspects of the New International Economic Order; Hossain (1980) at p.156-158.

713. See the **UNCTAD** Medium Term Plan 1984 - 1989, Chapter 20, Major Programme: Science and Technology, Programme 2, Transfer of Technology - **UNCTAD** Doc..

A/3716; **UNCTAD**'s approach to the legal issues raised by technology transfer and development issues however continues to be un-focussed or un-clear. **UNCTAD** divides the legal issues into

(i) International Legal Issues - the Code;

(ii) National laws, regulations and policies on transfer and development of technology;

(iii) The economic, commercial and developmental aspects of the industrial property system;

(iv) Policies and instruments on the promotion and encouragement of technological innovation;

Though this division is convenient, the links that is by way of minimum international standards and norms, international general principles etc. which as we have shown in this work are now apparent, are often discussed in a dichotomised or truncated way, thus retarding faster development and identification of new norms, standards and principles while unduly enhancing traditional legal opinion divisions between technologically developed (exporting) states and developing countries (largely consuming) countries.

714. **Key Concepts in International Investment Arrangements and their Relevancy to Negotiations on International transactions in Services, UNCTC**, Current Studies, Series A, Number 13, ST/CTC/Ser./A/13, United Nations Centre for transnational Corporations, New York, 1990 at 24.

715. For detailed discussion of codes of conduct in relation to multinational business, see; **International Codes and Multinational Business - Setting guide-lines for international Business Operations** by John M Kline - Quorom Books,Green Wood Press,1985.

716. See - Rubin, **Developments in the Law of International Economic relations: Reflections Concerning the United Nations Commission on Transnational Corporations** 70 AM.J.INT.L (1976).

717. See for instance - Dennis Thompson; The **UNCTAD** Code on the Transfer of Technology, Journal of World Trade Law, Vol.16, No.4, 1982 at p.31.

718. E.g traditional institutions such as the Bretton Woods institutions, until recently, did not specifically mention or deal with "developing countries". The inclusion of development objectives in the World Bank Charter was aimed at correction of temporary dislocations caused by war in Europe; See for instance History of **UNCTAD** infra. note 724, at p.9; Early efforts of the United Nations to reform the international legal system governing the transfer of technology and skills to LDC's include - UNGAR. 1713(xiv.) December 1961 which called for a study of the effects of patents on the economies of LDC's. The resolution largely centred on the need to study patent legislation in LDC's and problems of granting, protecting and use of patents in LDC's. This was followed by other resolutions, increasingly in **UNCTAD**, which gradually specified technology transfer as an issue E.g GAR.. 1713(xvi.)1964, in **UNCTAD** 1 Final Act, UNGAR. 2091(xx.) of December 1965 which recommended the full study of existing national and international practices for the

transfer of patented and un-patented technology to developing countries. Se also Resolution 150 (xvi) at the 456th. meeting, 1976, on the transfer of real resources to developing countries.

719. See - The transfer of Technology to Developing Countries, with special reference to licensing and know - how agreements TD/28/Supp.1 and Corr.1 in proceedings in UNCTAD, 2nd. Session Vol. 1, Report and Annexes.

720. The law of "interdependence" has certain characteristics of which the essential ones are;

(i) it is concerned not only with delimitation of the rights of states, but also with harmonising them;
(ii) In every question it takes into account all various aspects;
(iii) It takes general interest fully into account;
(iv) It emphasizes the notion of the duties of states not only towards each other but also towards international society.
(v) *It condemns abuse of right;*

(vi) It adjusts itself to the necessities of the international life and evolves together with it, accordingly, it is in harmony with policy;**General Assembly on The Issue of The Admission of a State to Membership in the United Nations** Advisory Opinion of the ICJ Reports, 1948 at p. 57; also See - New Trends in Contemporary International Law , by Judge T.O Elias, Foreword by L. Wilberforce, The Josephine Onoh Memorial Lecture, 1985.

721. The view that the Code is a unilateral LDC effort either in its inception or negotiation is erroneous, though even some LDC jurists seem to affirm its correctness - See Draft International Code of Conduct on The Transfer of Technology, TD/Code/TOT/52, 1988. View by UNCTAD expert Luiz O Baptista at p.15; The Draft International Code of Conduct on The Transfer of Technology, by Fikentscher Wolfgang, II C, 1980, at p.5.

722. See Fikentscher Wolfgang, opcit. note 721, especially footnotes at pp. 5 - 6. The Pugwash Conference marked the threshold or change from speculation about international regulation to actual proposals for negotiation. A draft Code appeared after the 1973 Pugwash Conference (See World Development Journal Vol.2, Nos. 4 and 5, 1974, pp. 7 - 82). The Secretary General of the conference had remarked in his opening speech that in light of the existing international situation, which is disadvantageous to technology buyers in the LDC's be they Governments or private firms, there is urgent need for a code of conduct to govern international transactions - See also UNGAR 3201 (S-VI) of 1974; Lima Declaration , opcit , note 323.

723. The influx of newly independent states (or formerly non self governing territories), into the international arena during the early 1960's was a primary cause of the change of United Nations emphasis from political to social economic issues; See also Article 55 and 60 of United Nations Charter.

724. Established under GAR.. 1995 (xix.) Dec. 1964, **UNCTAD** was meant not merely to be a forum for the discussion or formulation of new approaches to international trade but also to act an instrument for the realisation of specific policies and agreements passed under principles and guide-lines of the United Nations - See UNCTAD for a New International Economic Order by Zalmai Haquani, UN New York 1978 at pp. 3-10; The History of **UNCTAD** 1964 - 1984, **UNCTAD**/OSG/286. UN, New York, 1985.

725. UNGAR 3202(s-vi)1974, called for the formulation of a Code of Conduct for the transfer of technology. Under the resolution technology transfer was to be based on three limbs that is:

(i) Improving access to technology;

(ii) Promoting effective transfer;

(iii) Encouraging indigenous Technology Transfer in LDC's.

Resolution 3362(s-vii), s. iii, para. 3 passed at the seventh session called for international co-operation to evolve a transfer of technology Code, **UNCTAD** Reso. 89 (iv) Nairobi, 1976 called for an intergovernmental group of experts to elaborate a Code of conduct etc. all the calls while emphasising the need for special assistance to LDC's, contain no effective mechanisms for the accomplishment of this goal, especially in relation to LLDC's. The developed countries effective will to assist may be reflected in the stand of organisations in these countries, for instance the international chamber of commerce has always stood for protection of private technological property and appropriate remuneration for suppliers of technology- irrespective of the relationship between supplier and recipient. According to the Chamber, parties to transfer of technology transactions should be given full autonomy to choose the law applicable to their transaction and the forum for the settlement of disputes; see ICC TD/Code NGO's/6; TD/Code/TOT/49, 6th. session of the UN conference p. 281.

726. For a discussion of the concept of common heritage of Mankind, See Christopher C. Joyner - Legal Implications of the concept of the common heritage of mankind. International and Comparative Law Quarterly, Vol. 35, 1986 at pp. 190 - 199; North-South, The adjustments Ahead OECD 1981.

727. See **UNCTAD** TD/Code/TOT/21(part two) and TD/Code/TOT/47 Appendix E.

728. As Wallace notes in relation to the European Community experience, a certain loss of sovereignty is a practical necessity in the application of a binding instrument by an international or regional body, See **International Codes and guide-lines for Multinational Enterprises: update and selected issues**, International Lawyer 1985; also Chapter V of this current work in relation to the Andean Pact experience.

729. The issue of the inappropriateness of traditional international law principles in regulation of international resource transfers continues to be rigorously discussed. For a discussion of the issue in the context of foreign investment - See, *Inter alia*, U. S Banco National De Cuba V Chase Manhattan Bank 658F.2nd. 875(1981) pp.887-894; Topco Case- International Law Reports, Vol. 53 (1979); Aminol Case - **International Legal Materials** (vol. 17) 1978 .etc. Some of the traditional principles established in such cases E.g in relation to standards of compensation,

have never been accepted by more than half of the world's legal systems. Consequently, it would be unjust to impose, through a multilateral instrument, principles which have been bilaterally rejected or objected to.

730. For a discussion of some of the legal measures OECD countries have taken to control the effects of monopoly power abuse within their territory, see chapter V of current work. Also -for a discussion of issues of harmonisation of private industrial property rights and the public interest, see **United States** V **Studiengesellschaft Kohle** M.B.H. 670 F. 2nd, 1122 at 1127, US Court of Appeal for the District of Columbia - The Court noted, *inter alia*, that:

> "The Patent laws, authorised by the constitution, were enacted by congress to stimulate invention and reward innovation by granting a patentee a 12 year monopoly....(US Constitution Article 1, s.8,35 U.S.A s.154). Such a grant is in inevitable tension with the general hostility against the monopoly expressed in anti-trust laws...";

See also - Intellectual Property Review, Recent Developments in Patent-Anti trust interface, response to a new reality at pp.162. There is a growing trend towards liberalisation of anti-trust regulation; **International Business and National Jurisdiction** by A.D Neale, (1988); **International Technology Transfer: Concepts, Measures and Comparisons** by Rosenberg. N and Frischtak C, New York 1985; Competition law in the European Communities, Praeger Special Studies, Jan 1989, vol.12. No.1 at p.2 ;

731. The issue of Restrictive Business Practices, as discussed below, seems to be an over lap in the Code with other multilateral instruments such as the Code on restrictive business practices. The Code on restrictive business practices is however general and does not deal comprehensively with technology transfer restrictive practices - See, **UNCTAD** Report -Report of the second Adhoc Group of Experts on Restrictive Business Practices, **UNCTAD** /TD/B/C.2/AC.5/6 march 1976 at pp.7-8; The New Code Environment, **UNCTC**, Series A, No.16, 1991; **UNCTAD** - TD/B/1261, May 1990, Trade and Development Board, Report of the Intergovernmental Group of Experts on restrictive Business Practices on its 9th.. Session.

732. See Chapters II & VI of this Current work.

733. Vienna Convention on the Law of Treaties 1969, Art. 31; Waldock, YBILC (1966 I) esp. at p.184 and for a through discussion of treaty interpretation, see Yambrusic, opposite at. p.169-218; **The Law of Treaties by Lord McNair**, 1961; **The major International Treaties** 1914 -1945, A History and Guide with Texts - J.A.S. Grenville, Methuen, 1987.

734. **Encyclopaedic Dictionary of International Law**, Parry and Grant, Oceana Pub. 1986.

735. Lauterpacht: **The Development of International Law by the permanent Court of International Justice**, especially at P.250.

736. According to Hudson, certain circumstances require or necessitate lack of clarity in the stated intention or the use of constructive ambiguity. Ambiguity becomes a desideratum per se, to maintain uncertainty. This is often in cases where no immediate solution exists or where only evolutionary processes may allow solutions acceptable to all parties- See, Hudson, opcit note 409; Free-Zones Case Series A/B NO. 46, pp.182-3, at which it is said that account should be taken of human psychology and more particularly of governmental psychology. According to many authors the ICJ has failed to establish a consistent pattern of norms for treaty interpretation. Art. 31 and 32 of the Vienna Convention is a UN legislative initiative to establish such norms.

737. See The Challenge of developing in the 1980's our response Edited by Anthony Jennings & Thomas G. Weiss esp. at p.55, Fikentscher W, opcit, note 721, at p.9.

738. Appendix A to TD/Code/TOT/47.

739. See for instance the revised text of the draft outline of an international Code of Conduct on the Transfer of Technology, **TD/A.C 1/4**, submitted by the experts from the Group of 77; Doc.. **TD/B/C.6/14** Annex II November - December 1975, revised by the representative of Mexico on behalf of the Group of 77; World Development(Journal),Vol. 2, No. 4&5, April 1974 at p.79; Dennis Thompson, The UNCTAD Code of Conduct on the transfer of technology J.W.T.L vol. 16 no.4 pp 311-337 at p.319; Canadian Year Book of International Law 1980 at p.234 - for discussion of Group B's insistence on the right to freedom of contract and respect for industrial property rights; also see- UN. Doc./TD/B/C.6/14 (1975) annex 1.

740. Preamble, TD/Code/TOT/47, Article 1.

741. Developed countries have resisted the incorporation of "**ancillary**" rights and duties such as those found in United Nations General Assembly - E.g the Charter of Economic Rights and Duties of states G.A Reso. 3281, 29 UNGAR Supp. 31, UN Doc. A/9631(1974), See Rosenthal -The Charter of Economic Rights and Duties of States and the New International Economic Order, 16 VA.J.INT.L 310 (1976); However, see Chapter one of this work on Methodology and Issues.

742. Paragraphs 5, 6 and & 7, TD/Code TOT 47.

743. TD/Code/TOT/47 para. 8, 9 &10.

744. For suggested solutions to this controversy, see Chapter V of this Current Work.

745. For a discussion of maintenance of international (trade) competitive without negative monopolistic practices - See, The Newly Industrialising Countries and Radical Theories of Development; **World Development Journal** Vol. 13, NO.7, 1985, at p.789.

746. Appendix A TD/Code/TOT 47 and proposals - Appendix B TD/Code TOT/47, Para.13.

747. TD/Code TOT/47, Chapter 1.1(a).

748. The complexity of international technology transfer transactions may be illustrated by a simple diagram:

1 Multilateral Technological Co-operation & Assistance Multi- Bilateral arrangements

2 Bilateral agreements (including state contracts)

.[International joint ventures etc.]

[State - A] _____ [State B]

&

3 [Non Governmental Organisation parties]

4 [Supplying - Party]_____ 5.[Recipient]
Local or foreign subsidiary.

6 Third Party (E.g sub-licensee)

7 Regional organisations, state or private party.

Transactions can occur between and among any of the parties 1 - 7.

749. See Chapter VI of Current Work on developed country position during on-going Uruguay Round on issues of private party intellectual property rights protection in host states

750. TD/Code/TOT/47 para 1.4 .

751. See North- South Technology Transfer, the adjustments ahead OECD,1981 esp. pp.27-28; Kwamena Acquaah- International Regulation of Transnational Corporations, the New Reality, 1986, Praeger, and Fautorous's comment that:

> "the ability ..to utilise resources located in several territories, to transfer or withhold resources from country to country, and to choose appropriate mode and degrees of operation in accordance with the management's perception of the company's interest (allows transnational enterprises) to take advantage of the conditions- natural, financial, political and legal, prevailing in any particular country, and to evade, when necessary, some of the effects of such conditions"

A.A.Fautorous, Columbia Journal of Transnational Law vol. 10 at pp.330 [1971]; Para. 53 of the UN Code of conduct on Transnational Corporations, **UNCTC** Current Studies, Series A No.4 UN 1986 ST/CTC/Ser.A/4 calls upon Transnational Corporations to cooperage and participate in the promotion of economic and social development in hosts states.

752. According to the **WIPO Licensing Guide** : Technology means systematic knowledge of the manufacture of a product, or the rendering of a service in industry, agriculture or commerce, whether that knowledge be reflected in an invention, a utility model, an industrial design, a plant variety, or technical information in the form of documentation, or in skills or experience of experts, for the design, installation, operation or maintenance of an industrial plant or its equipment or for the management of an industrial or commercial enterprise or its activities; See also, Workshop on Industrial Property Rights in Joint Venture Arrangements, held in China, Lecture No. 2 - **Methods for the Commercial Transfer and Acquisition of Technology and their Relationship to Joint Venture Arrangements**, Lecture prepared by the International Bureau of the World Intellectual Property Organisation, **WIPO** Doc. WO/BW/2, Geneva, October 1982.

753. Para. 1.2, TD/Code TOT/47, Chapter 1.

754. See Chapter V of this current work.

755. Para.1.3, TD - Code TOT /47 , Chapter 1

756. Para.1.3(a), TD - Code TOT /47 , Chapter 1

757. Para 1.3 (c) &(d).

758. Appendix C, TD/ Code TOT/47, recommendation by the Secretary General and President of the conference for para.1.4.

759. For a discussion of mandatory direct regulation statutes and the opposing facilitating law or non regulatory approach - See Chapters I and V of Current work.

760. For modifications of this approach, see Chapters I and V of Current work. However, under framework treaty law and institutions, a flexible and evolutionary process resolves such issues.

761. Para.2.1 (i),TD/Code TOT 47, See also the Centre for Transnational Corporations Reporter **CTC Reporter,** UN, No.11, 1982 at p.33.

762. Draft international Code of conduct on the Transfer of technology, TD/Code TOT/52, 1988 at pp.3-4 and para 2.1(vii) and (x) TD /Code TOT/47.

763. Para.2.1(iii) TD/Code TOT/47.

764. The Principle of **good faith** has long been accepted in international law as no less obligatory upon states than upon individuals in carrying out agreements - Bin Cheng, quoted as citing sole arbitrator in the Metzger & CO. Case- in **Public International Law**, Text Book, Holborn Law Tutors, 13th Edition, Edited by R. MacLean at p.180 (herein after MacLean); According to Lauterpacht, the essence of the doctrine of abuse of rights is the sacrifice of an important social or individual interest to a less important though hitherto legally recognised individual right, cited in MacLean, opcit at p182; Dr. Kiss suggests three elements which are central to the doctrine - (i) the use of a state power which interferes with another state use of a power, (ii) the use of a power for a reason which was not one for which the power was conferred,

(iii) the use of power in an unjustifiable or arbitrary manner, quoted in MacLean, opcit at p.182, also see. Baranson and Roark; Trends in North - South transfer of high technology, in International Technology Transfer. Concepts , Measures and Comparisons at pp.33-34.

765. Para 2.1(v) and (vi).

766. See Chapter VI of current work (Trade and Technology).

767. For a discussion of the concepts of international obligations vis-a-vis international law, see - ; also see Chapter V of this current work.

768. Para 2.2 (iii) TD/Code TOT 47.

769. Para. 2.2(iv) TD/Code TOT 47.

770. UNGAR 3201 (s-vi)[1974]; para.2.2(v),(vi),(vii).

771. See Chapter V of this current work.

772. It has been consistently stressed that nothing in the Code should be construed to supersede applicable national law e.g. see **UNCTAD**/TT MISC.71. Generally, Codes of conduct, by their very nature that is incorporation of general international legal norms and standards, should not be mandatory or confer powers of implementation on an international institution, but rather encourage the raising of the threshold of the international legal content in national laws that is enhance harmonisation - See Hans Baade, The Legal effects of Codes of Conduct for Multinational Corporations, **In Legal Problems of Codes of Conduct for Multinational Enterprises.** Edited. N. Horn 1980, at p.5 - 7.

773. See Chapter V of this Current work.

774. Report of the Committee on the Transfer of Technology on its third session, November.1980, Supp. No.5, UNTD/B.O.R 22nd.. session paragraphs 50-52.

775. An **UNCTAD** expert (Carlos Correa) suggested that a nation which accepted the Code would be bound, implicitly, to conform to the principles of the Code, at least where the Code rule was express, rather than implied or unstated. However, it is apparent that the Code, in its present form is largely ambiguous and the states party to the negotiations would like to retain the ambiguity; See Draft International Code of Conduct on the Transfer of Technology TD/Code TOT/52, 1988 esp.at p 15.

776. Consultations on the Draft International Code of Conduct on the Transfer of Technology, **UNCTAD** TD/Code TOT/50,10 OCT. 1986 esp. Para 19 and **UNCTAD**, TD/B/1030.

777. **UNCTAD**, Report of the intergovernmental group of experts on the RBP'S on its third session TD/B/1030, especially 22&23. Group B suggested that the Group of 77 should supply the necessary information since most of the contracts were performed on their territory and restrictive practices could be curtailed through effective application of national restrictive practices legislation. The Group 77 called

for the effective implementation of the set of multilaterally agreed principles on restrictive practices since Group B did not show a will to implement the set.

778. See TD/Code TOT/47 and Appendix A.1 and D for proposed additions.

779. See Major Issues arising from the transfer of technology to developing countries, pp.10-12.

780. TD/Code TOT/47, Chapter 4 and Appendix A, 4.5 (4), (5), (7) and **UNCTAD**, Major issues arising from the transfer of technology to developing countries TD/B.A.C.11/10/REV.1(1974).

781. Originally, the group of 77 submitted a draft which listed over 40 practices which were regarded as restrictive, a list which has been subsequently "re-framed" to fit into general categories -See for instance ,**UNCTAD**, TD/AC.1/4 annex 1 1975.

782. For instance, courts in the U.S.A have upheld the right of enterprises to take measures otherwise regarded as restrictive, so long as they do not discourage active competition or protect weak competitors, E.g in Berkey Photo V Eastman Kodak Co. 3 F. 2nd. 263 (2 Cir. 1979). Telecorp V International Business Machines Corp. 510 2nd 894 (10 Cir 1975) .

783. E.g see - Fikentscher W, opcit. note 721, at p.65; G. E Weston, **New Trends in the US Anti trust law: The Patent- Anti Trust Interface as an Example**, 15 II C 269 (see note 108), & TD/Code TOT/52,1988 at p.5.

784. Current Issues In International Business Law, edited by David. L. Perrot, Avebury, 1988.

785. Draft International Code TOT 52,1988 at p.4 also Zuizdwijk, The UNCTAD Code on the transfer of technology 24 Mcgill L. J 562 (1978). According to Fraser, RBP's though condemned as potentially harmful, could be justified if :

(i) If they caused avoidance of risks to consumers;

(ii) To protect strategic industries or those threatened by foreign dumping;

(iii) Were necessarily incidental to a common price agreement operating in the public interest;

(iv) They enabled a smaller concern to compete effectively against a larger concern which is using RP's - See **Monopoly, Competition and the Law** by Tim Fraser at p.121.

786. TD/Code TOT/47, Chap 4, Appendix A 4.5 (ii), Chap 3 para. 3.2. The recipient may *inter alia*, be required to purchase capital goods and technical services along with the desired technology; Transnational Corporations in World Development. UNCTC esp.at pp.176-182.

787. See Law and the Multinational Enterprise by Detlev F. Vagts in The Political Economy of Law, opcit, note 32, at pp.374 - 375.

788. TD/Code TOT/47, Paragraph, 3.2 & 3.6; 1.4 and Chap 4.

789. See - Transferring Hazardous Technologies and Substances - The International legal Challenge, by Gunther Handl and Robert E. Lutz, Graham and Trotham, Martinus Nijhoff 1989; The Bhopal Disaster Case. Pashukanis explains this apparent dilemma in legal-economics terms by stating that in a market place, only the continual reshuffling of values creates the idea of a fixed bearer of such rights. In the market place, the person imposing liabilities simultaneously becomes himself liable. He changes roles instantaneously, from claimant to debtor (because of the continual "reshuffling of values in the market) - See **The Political Economy of Law - A Third World Reader**, opcit, note 32, at p.45.

790. Report of the second Adhoc Group of experts on the Restrictive Business Practice **UNCTAD**/TD/B/C.2/AC/5/6 (1976) at Pp.18-19, suggested by experts from Group B; Art. 46 of the Havana Charter, The Act was not ratified and did not come into force.

791. Article 46, Havana Charter.

792. Article 46, (2) (c) of the Havana Charter.

793. The Havana charter Article 46 used the mandatory word shall in providing for a duty to avoid RBP's. The same was used in Group 77 first proposal E.g see **UNCTAD** TD/AC.1/4 (1975). The current proposals use the word "should" TD/Code TOT /47, Appendix A.2.

794. An **UNCTAD** expert suggested the criteria for the outlawing of restrictive practices as:

(i) Those practices which are unduly restrictive of competition;

(ii) Adversely affect international trade or the economic or technological development of the countries affected by the restrictions;

Such criteria, while useful, create problems of interpretation for instance what is meant by competition, reasonableness, adverse etc.

795. See Chapter V of this current work.

796. E.g Farouk Contractor - opcit. note 711, at pp.3-5 - states that Mexico saved up to $250 Million by introducing strict control over royalty payments and preventing undue restriction of exports. The sum was roughly equal to the cost of one years imports; See Towards a theory of Technology Licensing, Stanford Journal of International Law vol. 25, No.1 Fall 1988 at pp 195-229; However see Chapter V of this work on the implications and effects of direct regulation statutes.

797. For a general review, see A. A. Faotouros On the Implementation of International Codes of Conduct: An analysis of Future Experience, the American University Law Review, Vol. 30, pp.950.

798. From the beginning of negotiations, Group D did not favour a binding Code, See **UNCTAD** /TD /Code TOT/21 (part two).

799. See Chapter V of this current work for discussion of the concept of Mixed Jurisdiction.

800. Mr. De - Souza, participant representing France at the sixth session of the United Nations conference on International Code of Conduct for the Transfer of Technology; See also Kline , opcit. note 715, at pp.46.

801. The US representative at the Code discussions was of the opinion that:

> "nothing contained in a voluntary Code was going to become law anywhere any time soon in any place meaningful. But the Code will be read, studied and quoted in Arbitration. It could create an appropriate climate"

- See US Department of Advisory Committee on International Investment, Technology and Development, November 1980 at p.23; For a contrary view which is in accordance with the dynamic and complex nature of legal evolution in this area, see A. A Fatourous, who cites, among others, the example of producers associations which were legalised by a UN GA Resolution that is under Article 5 of the Charter of the Economic Rights and Duties of States, GAR.. 3281 UNGAOR, supp.. (no.31) 52, UN Doc.. A/9631 (1974); Solysinki **Choice of Law and Choice of Forum in Transnational Technology Transfer Transactions,** Recueil Des Cours vol.196 (1986).

802. The rules or obligations in the Code would, like all general norms point to the existence of duties and obligations not create them. Implementation under framework treaty institutions avoids a static determination of obligations.

803· **Key Concepts in International Investment Arrangements and their Relevancy to Negotiations on International Transactions in Services, UNCTC** Current Studies, Series A, Number 13, United Nations, New York, 1990 at pp 55 - 56.

804. See **Chapter 1** of this current work for a discussion of the soft and hard law debate.

805. Chapter 5, TD/Code TOT/47. Para 5.1; See also Article 53 of the Draft Code of Conduct on Transnational Corporations - The New Code Environment, **UNCTC** publication Series A, Number 16.

806. TD/Code TOT/47 Para 5.2(c).

807. Chapter 5, TD/Code TOT/47, Para 5.4(v).

808. TD/ Code TOT/47 Para. 5.3(iii) & 5.4(ii).

809. TD/ Code TOT/47 Para. 5.4(vii) & 5.3(c) (ii).

810. See chapter V of this current work; Consultations on an International Code of Conduct on the Transfer of Technology **UNCTAD** TT/MISC.70 1987.

811. TD/ Code TOT/47 Para 5.3(a) (i) (ii).

812. TD/ Code TOT/47, Para. 5.2(b) and 5.4(x).

813. Charter on Economic Rights and Duties of States (CERDS) , Chap 1(b) art 18 and 19. Such preferential treatment is now part of many international arrangements for instance the General System of Preferences GSP under part 4 of **GATT**, Multilateral Technical Co-operation (See Chapters III and IV of current work), Generalised System of Trade Preferences **GSTP** etc. Preferential Treatment has been referred to as infant nations protection, a legal parallel to the economic infant industries protection. See, H. Kramer, **Changing Principles Governing International Trade** 8 J.W.T.L 227 (1974).

814. See Chapter V of current work.

815. UN Doc. TD /B/C.6/AC.1/2/SUPP 1/ REV 1(1975) at p.41.

816. Patent World , Issue Ten , July 1988, Surveying the World Scene- an exercise in Harmony of the Patent Laws; John P Sinnott; See Chapters II, V and VI of Current work.

817. TD/Code TOT/47, Para.6.1 & 6.2 & especially Para. 6.1(i).

818. See **Chapter 3** of current work.

819. TD/Code TOT/47, paragraphs 6.2 (i) - (vi) and para. 6.3 & 6.4.

820. TD/Code TOT/47, Appendix A Para 8.1 (a). For a definition of *framework treaties* see, opcit, note 17, and accompanying text.

821. Established under GA,- Resolution 1995 (xix.) as amended by Annex A.iv.26 of the final Act of the first session of **UNCTAD**, September 1973; The committee has functions established under the rules of procedure, Board Rule 79.

822. TD/Code TOT/47, Para. 8.1 (c).

823. TD/Code TOT/47, Para.8.2 (1) (b).

824. TD/Code TOT/47, Para. 8.2 .1 (a).

825. E.g see Blainplain, **The BADGER CASE and the OECD Guide-lines for multinational Enterprises** at p.126.

826. For support of the *ordre* public and ius cogens argument see for instance Bier, Conflict of Laws Problems of Trade Mark Licensing Agreements 13 **II C** 162 (1982) (see note 108), Correa, Transfer of Technology in Latin America: A Decade of Control 15 J.W.T.L 388 (1981), and TD/Code TOT /47, Appendix A , Chapter 9 (1). The **UNCTAD** Secretariat suggested that the Code provisions be generally applicable in conformity with national legislation governing validity , performance or interpretation of any transaction - an International Code of Conduct on Transfer of Technology Report of the **UNCTAD** secretariat; UN Doc. TD/B/C.6/A.C.1/2/Supp/REV.1 (1975) PP.3; See Chapter V of this current work.

827. Group B feared "supremacy of national laws" as tending to give free reign or having a legitimating effect on even the most radical transfer of technology laws, even if such laws eliminated freedom of contract, See for instance UNCTAD/TT/MISC.70, 1987 at p.8.

828. This has been said to be the legal system to which "reasonable" parties considering the relevant factors, would have resorted- Cheshire and North - Private International Law at p.207. However, in practice, factors such bargaining power, access to information do affect "reasonableness" and actual determination of entitlements.

829. Appendix F, Chap 9, text prepared by the interim committee Section 9 (1).

830. See **Chapter 5** of this current work.

831. See early suggestions by the G77, Appendix D, Section I B, Paragraph 4, UN Doc. TD/ Code TOTADD.1(1978); ART.(V) UN Convention on the Recognition and reciprocal enforcement of Foreign Arbitral Awards.

FOOT NOTES FOR CONCLUSION

832. These include political or economic commitments to safeguard employment or income levels even in internationally non competitive industries or sectors - See *inter alia*, Human Development Report 1992, Published for the UNDP (UN Plaza, New York) by Oxford University Press.

833. See **Chapter I** of this work for discussion of the hard - soft law dichotomy and rhetoric.

834. Title Xv : Research and Technological Development, Articles 130f - 130p, **EEC Treaty (Maastricht Version)**, [1992], 1 C.M.L.R 573.

835. The term 'normalcy' is applied by Tarullo to describe the situation of 'sameness' towards which all countries develop, with underdevelopment being regarded as an aberration from the 'norm' of an *industrialised free market economy*. While disagreeing with his definition of the ideal norm, the principle we refer to the principle to illustrate that the condition of underdevelopment is a permanent condition encompassing different States at different times, See The Organising Principle of Normalcy, in **Law and Development**, International Library of Legal Essays, pp. 477 - 483.

836. For discussion of North - South Licensing of Intellectual Property Rights, see Chapter 4 of present work.

837. See **US Military and Para Military Activities Case**, ICJ Reports 1986, 97, paragraphs 183 - 215; also **General Assembly on the issue of the Admission of a**

State to Membership in The United Nations Advisory Opinion of The ICJ Reports 1948.

838. See Annex XXXIX of Lome IV Convention, which allows the EEC to apply a third - country preferential treatment to ACP products which, if offered MFN treatment would cause imbalance or discriminatory effects on the Community market.

839. See Article 356 of Lome IV Convention.

840. The Calvo Doctrine has two main elements that is a sovereign state is entitled to non intervention by other states in the exercise of its sovereign rights and that aliens are entitled to the same treatment as nationals - See Carlos, *Le Droit Internationale et Pratique* (1986) and Chapter V of this current work.

841. Hull's letter, reprinted in Hackworth 3 Digest of International Law (1942); **Anglo - Iranian Oil Co. Case** (United Kingdom V Iran) ICJ Pleadings (1951; Chorzow Factory Case [1927] P.C.I.J Series A, No.13.

842. Generally, See - The Law Making Functions of The Specialised Agencies if The United Nations, opcit .

843. For discussion of the position of the least developed countries and special multilateral measures that are a pre -condition for the successful absorption of imported technology by these countries, See Chapter 3 and 4 of this Work.

844. Throughout this Work, we have illustrated the systematic character in which organised international society operates in communicating and disseminating information on legal developments and practice. Consequently, it is now possible for all States to follow the *logical* development of norms and participate dynamically in their concretisation, if necessary, into the form a treaty or convention, without great lapses in time.

845. Balance of Commitments is also increasingly, especially in the GATT framework, also referred to, rather ambiguously, as *overall reciprocity* However, due to the lack of any precise definition of the term reciprocity and its historical associations, we avoid use of the term. The obscure meaning of the term reciprocity, see Chapter II above and E. Dell , Of Free Trade and Reciprocity, The World Economy (1986), p. 125; and for a discussion of "overall reciprocity" in the GATT, See D. Dicke, Non - Reciprocal Treatment, in Foreign Trade in The Present and New International Economic Order - Fribourg University Press, 1988, pp.110.

Table A - Years 1987 and 1981 - 1987

Nigeria
Nature and freequency of unacceptable terms in agreements submitted for registration

Contractual terms	Number of Agreements Containing Contractual terms	Percentage
No Provision for Training	256	40
Excessively Long Duration	320	50
Transferee oblidged to pay transferor's tax	128	20
No provisions for guarantees	268	42
Missing provisions	64	10

Nature and Frequency of Restrictive Clauses in the Agreements Submitted for Registration since Inception

Types of Restrictions	Number of Agreements Containing Restrictive Clauses	Percentage
Export Restriction	192	30
Tie - in Clauses	32	5
Lack of Research and Development	64	10
Foreign Jurisdiction	256	40
Price Restriction	6	1
Excessive Control of Transferee's Operations -	12	2
Restriction on Production Volume	25	4
Non - Reciprocal Transmission of Improvements, Patents -	25	4
Obligation to use Designated Personnel	12	2
Administrative Interference	12	2

The same agreement may contain more than one restrictive clause.

TABLE C

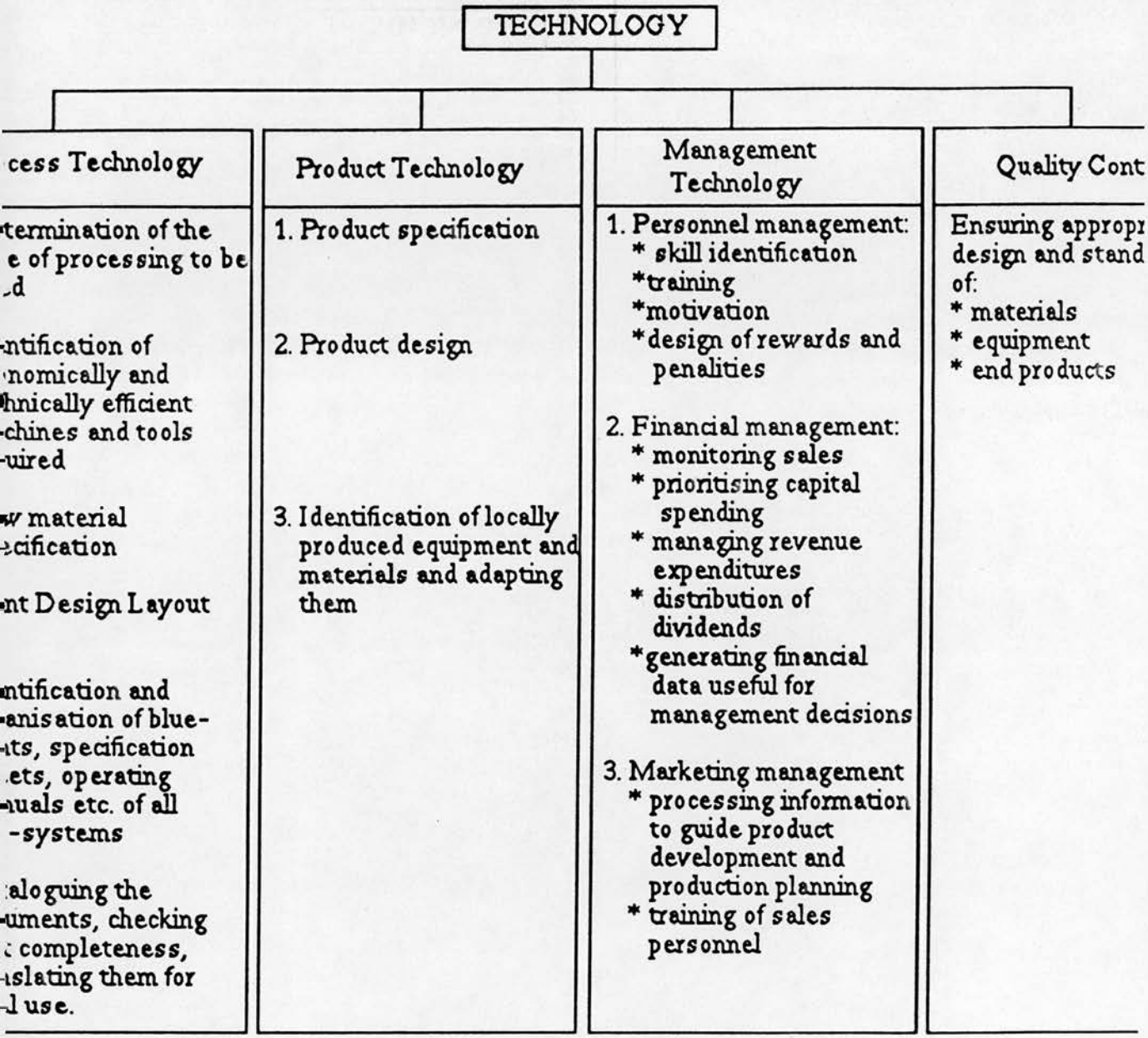
Conflict of Interest in International Technology Transfer Transactions.

Interest of Technology Owner or Supplier (Autonomy)	Interest of Host Country or Recipient (Balanced Commitments or Overall Reciprocity
Access to Sales in Local Market	Retention of Profits
Transfer of Profits	Equal Rights of Control Over Joint Venture
Control Over Technology	Free to 'Source' Technology from third parties
Supply of (sourcing) spares, parts	Greater Equity, Especially Acces to Industrial Proper
Greater Use of Intangible Assets	Research and Development in Host State
Control Over Research and Development	Protection Against Abuse of Dominant Position
Protection for Industrial or Intellectual Property	
<u>Control Over Performance</u>	<u>Technological Capacity (Aquisition of)</u>
Increase in Turn over	Start of New Production
Saving in Labour Costs	Payment according to National Levels
Saving In Research and Development Costs Abroad	Increased Use of Local Raw Materials
Extended Duration of Contractual Obligations	Shortest Possible Duration of Contractual Obligations
Limitation of Competition	Non Abuse of Dominant Position by Supplier
Limitation of Exports	No General Restrictions
Limitation of Third Sources Technology	Access to Improvements
Limitation of Guarantees of Warranties	Receipt of Payments for Improvements
Retention of Rights to Improvements	

SOURCE:
United Nations Conference on Trade and Development, Joint Ventures as a Channel for the Transfer of Technology, Moscow 1988, UNCTAD/ITP/TEC/9, United Nations, New York, 1990.

Table 1

Elements of a Typical Technology Transfer Package



logy Definition:

ock of knowledge which permits the introduction of new or improved machinery and equipment, pro ses and services. In a wider sense, it includes additional elements, such as management and mar

e: Transnational Corporations in World Development, UNCTC, Trends and Prospects, United Nati New York, ST/CTC/89, 1988, p.178)

TABLE B

Patent Applications and Grants During 1979:

ntry	Patent Granted Total	Residents	Patent Applications Total	Residents	Inhabitants p Applications
tina	3,375	1244	4,482	1,314	20,786
ias	37	1	37	1	n.a
adesh	103	20	131	31	2,282,000
a	127	20	134	15	361,866
	1,583	175	8,602	1,958	59,519
bia	844	36	420	45	580,488
Rica	20	6	107	30	72,066
s	52	2	52	2	n.a
r	110	7	170	23	348,739
	376	6	784	61	637,180
ador	67	6	143	16	275,625
ong	893	26	848	17	292,058
	2,182	594	2,910	1,053	626,391
sia			477	12	11,905,833
slamic Republic)	1,061	11	820	83	445,433
	82	9	220	37	341,378
a	63	2	73	6	359,833
(Republic of)	1,419	258	4,722	1,034	36,570
i	37		37	2	2,908,500
	12	2	19	2	n.a
	2,026	236	4,485	692	94,666
o	372	31	391	29	763,724
	571	26	284	6	n.a
n	446	8	404	30	2,656,833
nes	857	82	1,471	144	324,638
ka			227	53	274,377
nd			22	7	6,496,428
	242	3	261	26	238,230
	458	34	558	73	605,986
y	108	15	213	43	67,534
ela	660	39	2115	192	75,276
	96	11	98	11	2,500,818
	53		95	1	5,580,000
we	183	12	256	55	129,927
	24,618	6,846	32,174	11,303	4,722
y (Federal Republic)	22,534	10,895	55,184	30,879	1,980
	44,104	34,863	174,569	150,623	768
land	6,614	1,638	11,540	4,441	1,454
Kingdom	20,800	4,182	44,666	19,468	2,873
States	48,853	30,605	100,494	60,535	3,694

Sources - Columns (1) (2) (3) (4) ; World Intellectual Property Organisation (Column (5) Population figures in World Bank Atales were divided by fi in (4)

OAPI* 12 Member States of the African Intellectual Property Organisation i.e Beni United Republic of Cameroon, Central African Republic, Chad, Congo, Ivory Coast, Mauritania, Niger and Upper Volta.

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